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Supreme Court, U.S.

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No.

In The
Supreme Court of the United States

OCTOBER TERM, 1987

TERRY L. ANDERSON, ET AL

Petitioners,

v.

UNITED STATES DEPARTMENT
OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,

Respondents.

On Petition for Writ of Certiorari to the United States
Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether a case based upon hearsay spoiled by massive alterations by anonymous declarants can suffice as "substantial evidence" under 5 U.S.C. Section 7703?

II.

Whether Federal Sector employees who are concededly denied the right of oral reply provided by 5 U.S.C. Section 7513(b)(2) can enforce that right under the Federal Circuit's requirement of a showing that the outcome would have been different?

GROUP I PETITIONERS

(68)

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Robert E. Lambrecht	Norman E. Tracy
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Robert H. Voss
Patrick D. West

Albert R. Wickham
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Bernard D. Carroll
Robert J. Collins
Rick R. Crook
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Jean C. Eden-Kemphues
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

LEONARD E. DEHAINAUT, ET AL
("Chicago Center Altered Document Cases")

Petitioners,

v.

UNITED STATES DEPARTMENT
OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,

Respondents.

On Petition for Writ of Certiorari to the United States
Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

A Writ of Certiorari is respectfully sought to review the final judgment of the United States Court of Appeals for the Federal Circuit in the ninety one cases consolidated in this petition.¹

OPINION BELOW

The opinion of the United States Court of Appeals for the Federal Circuit is reported at 827 F.2d 1564 (Fed. Cir., 1987). This opinion, as well as the decisions of the Merit Systems

1) On suggestion of the respondents, the court below consolidated these cases for oral argument and subsequent decision.

Protection Board in these cases, are reproduced in Appendix A infra.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1). The jurisdiction of the Federal Circuit Court of Appeals rested upon 28 U.S.C. Section 1295(a)(9).

STATUTES AND REGULATIONS

INVOLVED IN THE CASE

1. 5 U.S.C. Section 7513 provides in pertinent part:

(b) an employee against whom an action is proposed is entitled to —

(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

2. 5 U.S.C. Section 7703(c) provides in pertinent part:

In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action found to be —

(1) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule or regulation having been followed; or

(3) unsupported by substantial evidence.

3. 5 CFR 1201 66 provides in pertinent part:

A stipulation as to any matter of fact satisfies a party's burden of proving the fact alleged.

STATEMENT OF THE CASE

Petitioners are former air traffic control specialists of the FAA's Chicago Center, Aurora, Illinois, who were terminated based upon charges that they participated in the PATCO strike of August, 1981.

These cases were consolidated by the Merit Systems Protection Board in 1982, and have come to be publically known and referred to as the "Chicago Center Altered Document Cases."

It is undisputed that the only evidence offered against the Chicago Center petitioners was agency hearsay. It is undisputed in the record of the Chicago Center cases that the hearsay was tampered with, in secret, by a select group of agency employees and contractors for the purpose of producing evidence which would be passed off as contemporaneous business records in the MSPB hearing on petitioners' removals. This evidence tampering involved both the alteration of existing time and attendance records with thousands of inculpatory entries made anonymously by unauthorized, non-supervisory personnel, and, in many cases, the outright manufacture of a record, backdated six to eighteen weeks, to make it appear original.

The alteration scheme was initially exposed at the MSPB consolidated hearing on petitioners' removals in November, 1982. At that hearing, the Chicago Center Chief, after identifying the Center "documents" as "ordinary course business records" in direct examination, was confronted with a second version of the same records which proved there had been

massive altered entries placed therein. After giving numerous, contradictory explanations, this witness ultimately disclaimed any knowledge as to how these "records" were created.

Although the MSPB's presiding official asked the agency, on numerous occasions during the hearing to explain the alterations, the agency refused to do so.² Ironically, the presiding official's findings indicated the lack of evidence on the alterations contributed to its probative value (App. 48):

Mr. Gunter (Chicago Center Manager) was unable to explain the "discrepancies" between these two sets of sign-in logs other than to make a vague statement that the file copy logs were "updated" and through a series of events at the hearing, no other evidence has been made a matter of record concerning when (if ever) the file sign-in logs were changed, who changed them, for what purpose they were changed, and which sign-in logs are more accurate. In view of the lack of evidence which would show that some of the file copy sign-in logs were "doctored" for specific purpose, I am unable to conclude that they were altered by the agency in an improper attempt to influence the outcome of these proceedings, and I find that they cannot be totally disregarded as probative evidence.

2) *Former Air Traffic Controllers v. Department of Transportation*, MSPB CH075281F0834 (1983). H.T. Vol. 6 at 82:

Presiding Official: It seems to me earlier in the hearing didn't I mention the possibility of bringing in some of the personnel specialist who were making those alterations - alleged alterations?

Agency Attorney: I believe we did have an off the record discussion, your honor, and I have tried to find personnel specialists who would be familiar. Unfortunately, because there were several of them doing it, they did the work and can't really explain why they did it.

The MSPB's presiding official affirmed the agency's removal of the Chicago Center petitioners in spite of the questionable hearsay, noting "the inappropriateness of making a blanket finding that would * * * be tantamount to pretending that a strike did not exist at the Chicago Center." (Id.)

The petitioners listed under the designations "Group I" appealed the initial MSPB decision directly to the U.S. Court of Appeals for the Federal Circuit.³

In affirming the MSPB decision on the Group I petitioners, the majority panel concluded that it was insufficient for petitioners to point out that the hearsay case against them lacked any indicia of reliability and accuracy due to the massive alterations, lack of authentication and lack of any identifiable declarant. The majority found:

Petitioners argue that requiring them to come forward with evidence of specific error improperly shifts the burden of proof with respect to hearsay evidence and that it was incumbent on the government to establish the "accuracy" of its records in order to establish a prima facie case against any petitioner. Again, we must disagree, if the government were required to prove the accuracy of every entry in order to use any part of the record as evidence, the hearsay evidence itself would be merely cumulative and unnecessary.⁴

3) The Group I petitioner's cases are captioned *Terry L. Anderson et al.*, CAFC 85-1146 and *Leigh Anderson et al.*, CAFC 85-1824 in the opinion of the lower court. (App. 2).

4) App. 28.

In contrast, the dissent, Baldwin, J., declared "(m)uch of that documentation was incomplete, inconsistent, and/or altered after-the-fact. Those records having not been prepared in the ordinary court of business, the board should have concluded that those records could not serve as evidence against anyone." (App. 31).

The Group II petitioners⁵ shared the record of the initial MSPB proceedings on the Chicago Center cases with the Group I petitioners but unlike the latter group, these petitioners did not appeal directly to the Federal Circuit. These petitioners filed a petition for review with the 3-member Board of the MSPB, which was an alternative appeal route under Board procedures.

In a decision dated February 8, 1984, the full Board vacated the initial MSPB decision (App. 115). Although specifically noting that the presiding official had "requested that the agency introduce additional evidence regarding the alterations and the reasons for making them in order to rehabilitate the documentary evidence" and although underscoring the fact that "the agency failed to offer any other testimony in rebuttal even though the presiding official gave it the opportunity to do so," the full Board remanded the case with directions to give the agency another chance to explain the altered evidence (App. 118, 129).

The remand hearing (involving only the Group II petitioners) was held in August, 1984, and the agency produced some of the participants in the evidence tampering scheme. The testimony of these individuals raised additional questions concerning the agency's hearsay case. The

5) These cases are captioned under *Allan A. Broholm, et al.*, CAFC 85-2814, and *Rudolf C. Radnoff*, CAFC 85-2821 in the lower court opinion, and under *Behensky et al v. Department of Transportation*, No. CH075281F0979, in the MSPB opinions of February 8, 1984, December 17, 1984 and July 5, 1985 (App. 115, 121, and 131).

following brief summary of this testimony is derived entirely from the admissions of the agency witnesses or the record stipulations entered by the agency, with appropriate references to the remand hearing transcript (herein "R.H.T.").

First the persons who made the inculpatory, altered entries on the agency documents were not even present or employed by the FAA Chicago Center at the time of the events recorded on the documents, and therefore had no personal knowledge of the truth of any entry they made. (R.H.T. 524-526). These individuals confirmed that they did not consult with the area supervisors or anyone else having personal knowledge of the petitioners' schedules, absences, leave or shift swaps. (R.H.T. 195, 253-54, 261-65, 268-69, 271-73, 281-83).

Second, the persons altering the records made thousands of changes to the original Chicago Center Records.⁶ They made an indeterminate number of altered entries on evidence which were ostensibly created by the area supervisors weeks or months before, without the knowledge of the supervisors responsible for the records.⁷

6) One of the participants in the scheme admitted that he alone was responsible for up to three thousand alterations to the Chicago Center's MSPB evidence (R.H.T. 1272).

7) The Chicago Center supervisors universally disclaimed any knowledge of the changes that were made to their records. E.G., Supervisor Gould (R.H.T. 803) (Didn't know who made the alterations or when); Supervisor Kok (R.H.T. 852, 853) (Persons unknown to him and without his authority changed leave entries to "AWOL" and other alterations); Supervisor Sanborn (R.H.T. 888) (Didn't know who obliterated annual and sick leave entries and substituted "AWOL"); Supervisor Plasch (R.H.T. 896-97) (None of the entries on his records for the relevant period were his; wasn't told of alterations).

In fact, one of the members of the team who tampered with the evidence admitted they were instructed that "(e)verything here (in room where alterations made) is secret, keep it under your hat." (R.H.T. 1055-56).

Third, although the alterations were made long after the events supposedly recorded on the Chicago Center records,⁸ the individuals who made the changes did not initial or date the entries. (R.H.T. 274-277). Consequently the altered entries were made to appear indistinguishable from original, contemporaneous entries made by the supervisors, (*Id.*) The person in charge of the scheme refused to answer why the altered entries were made without attribution (*Id.*), however he conceded that the result of that process was a complete spoilation of the agency's evidence, i.e., that the agency itself was unable to distinguish a genuine original entry from a fake.⁹

Fourth, the agency witnesses admitted, and the agency ultimately stipulated that the product of the evidence tampering was substituted for the original evidence which was then assembled at the FAA's regional office for submission to the MSPB. For example, the individual in charge of the room where the alterations were performed was forced to admit that the products of that room were substituted for existing MSPB evidence after the petitioners uncovered other documents which confirmed that the FAA region had custody of the Chicago Center records (for the MSPB litigation) before the participants in the scheme, according to their own tes-

8) The agency stipulated (in order to cut off further questioning on the subject) that the alterations were still being made in November, 1981, almost four months after the dates shown on the evidence. (App. 9).

9) The same agency witness was constrained to admit that "no one with the exception of God could look at these files and tell whether or not they are accurate." (R.H.T. 518-520).

timony began making the massive changes to this evidence (R.H.T. 613-4):

Q. O.K. Let's go over this systematically now. You were shown a stack of (time and attendance reports) which were amended in October, November and December, 1981, is that accurate?

A. Yes.

Q. And these ended up in the adverse action files?

A. Yes.

Q. And they were amended after a point in time when (the original version) went to the region?

A. After the files that the region had requested be sent, yes.

* * *

Q. And as to all the activity that occurred in the alteration of documents, that is, the personnel placing AWOL's on the documents in the war room, where they did not previously exist, in September and October, 1981, that is the activities of Mr. Peterson, Mr. Cullerton, Mr. Campbell, Mr. Erickson and Personnel such as that. These documents would have had to be sent up to the region and replaced other documents is that accurate?

A. Yes.

In an effort to truncate further testimony on this process of substituting altered records for original evidence, the agency entered a record stipulation which simply admitted

it occurred. (R.H.T. 694-95).¹⁰ The stipulation conceded that an unknown number of changes to the Chicago Center records (304's) were made as late as November, 1981 (Id.). As to the substitution of the altered version for original evidence, the stipulation stated:

Paragraph 4. These amended 304's were then copied and substituted for those in the files, which (files) eventually were transmitted to the Board as the appellants' adverse action files.

Fifth, after the substitution of the altered records for original MSPB evidence was exposed, the agency was requested to produce the original records for comparison purposes. (R.H.T. 617-18). The agency attorney thereupon confirmed that the original evidence had been destroyed.¹¹

The agency also conceded that it had destroyed all of the original Time and Attendance reports and all of the "swap books," which were the only records which documented scheduling changes between controllers.¹²

As to the question of authentication, the agency did not produce a single witness to authenticate a single entry on the watch schedules or time and attendance reports. And, as noted earlier, the supervisors uniformly disclaimed knowledge of the massive changes to the logs, including the inculpatory "AWOL" entries.

10) Although MSPB procedures (5 CFR 1201.66) specify that a stipulation as to any matter of fact satisfies a party's burden of proving the fact alleged, the Board failed to mention either the stipulation or the admission and did not find that the evidence was substituted.

11) (R.H.T. 618) ("...there was no reason to keep (the original records)...").

12) MSPB file - Agency Response to Motion to Produce. See also, R.H.T. 939-49 (Supervisor Niemeyer) (would need "swap books" to even make sense of the watch schedule), R.H.T 803 (Supervisor Gould) (swap books only way to verify accuracy of the Chicago Center's Schedules).

Q. So everything you were doing in the war room was for purposes of making up the packets for MSPB litigation?

A. Which is what it turned out to be, right.

Finally, the Group II petitioners even exposed a misguided attempt to fake certifications on hundreds of agency documents through the use of a facsimile signature stamp (R.H.T. 651-53). This scheme failed because the ink on the signature stamp bled through to the opposite side of the page, making it possible to show that the copies originally submitted to the MSPB did not contain the "certification". (Id.). When challenged to produce a single witness who would admit using the signature stamp on these records, the FAA attorney replied, "I have no intention of producing anybody to that effect." (R.H.T. 765).

These Chicago Center documents, tainted by a systematic, secret and unauthorized¹³ scheme to create an undetermined number of inculpatory entries, and which included an attempt to pass the entries off as original recordings, was the sole evidence offered by the agency in these cases. The agency never produced a single live witness who testified from personal knowledge concerning any of the petitioners alleged participation in the strike. No witness testified that a particular petitioner was absent without authorization. No witness even testified that a particular petitioner was even scheduled on any date relevant to the strike charge.

13) The FAA official who had custody of this MSPB evidence swore he was not aware of the alteration scheme and had not authorized it. (R.H.T. 1217). (Shewfelt). This official conceded it was improper to change the records and stated he would not have certified the Chicago Center records to the MSPB if he had known of it.

In bringing their appeal to the Federal Circuit under the substantial evidence review standard mandated by law,¹⁴ the petitioners pointed out that the MSPB decision in these cases was repugnant to the record because it failed to mention a single one of at least one hundred seventy eight admissions and stipulations by the agency itself which infected the probative value of the hearsay case.¹⁵

The majority panel dismissed the petitioners' many references to the record admissions as a "broadside" attack.¹⁶ Concluding that each of the petitioners carried the burden of showing the inaccuracy of each entry, the majority found the agency had no burden to authenticate its documents, or even to identify the accusers of the petitioners. The majority found the Board's "credibility" finding that the participants in the evidence tampering scheme had no improper motive unreviewable, even though petitioners' attack on the Board's decision was based entirely on admissions from the same agency witnesses.

In his dissenting opinion, Judge Baldwin responded (App. 31):

Although the majority recognizes discrepancies in the record, primary weight is accorded to the determination by the board that there was no attempt by the FAA to commit a fraudulent act, a forgery, a misrepresentation, or to commit perjury. I take no issue with the board's "virtually unreviewable" credibility determination regarding the lack of any improper intent on the part of the FAA. In focusing on the motives of the FAA, however, the board

14) 5 United States Code, Section 7703.

15) The MSPB decision did not refer to the transcript in a single instance on these issues.

16) The remand hearing was limited by the Board to an examination of the process by which the documents were created. Individual evidence was not allowed. Moreover, the agency did not introduce testimony going to any individual petitioner.

improper intent on the part of the FAA. In focusing on the motives of the FAA, however, the board has missed the key issue of the reliability of the record upon which the FAA case is based.

Petitioners in both groups also were denied most of the rights guaranteed by law, 5 U.S.C. Section 7513(b). For purposes of this petition, however, petitioners limit these issues to the denial of the oral reply right provided by Section 7513(b)(2) and implementing regulations.

In the Chicago Center cases, the facility management contracted with non-FAA employees to serve as mere recording mediums at the oral replies of the petitioners. These individuals announced to the petitioners at the outset of the oral replies that they had no power to make or even recommend a decision, thereby reducing the procedure to an exercise in futility. Both the MSPB and the Federal Circuit agreed the petitioners were effectively denied this right. However the Board held, and the lower court affirmed, that the petitioners had failed to demonstrate the harm in the loss of rights, by not demonstrating that the outcome would or might have been different if the oral reply rights had not been denied. (App. 20, 21). Petitioners assert that such a demonstration of harm is impossible and, unless this Court clarifies the "harmful error" language in the applicable statute,¹⁷ this important right¹⁸ will become sterile and inconsequential in federal sector removal actions.

17) 5 United States Code, Section 7701(2)(a)(c).

18) See, e.g. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985).

REASONS FOR GRANTING THE PETITION

1. Public Confidence In The Integrity Of The MSPB System Is At Stake.

The "Chicago Center Altered Document Cases" have called into question the very integrity of the institutions created by Congress to provide the exclusive means of adjudicating federal sector removal actions. 5 U.S.C. 1101, et seq., Section 7701; 28 U.S.C. Section 1295(a)(9).

The numerous developments in the course of the litigation of these cases have been reported in no less than forty articles in the local, regional and national press over the past two and half years. On several occasions the Chicago Center Cases became the lead story on the local and regional television news, and three times was carried on the national network in Washington.

The very thought that a federal agency, or any litigant, could prevail in a case based upon nothing more than the product of evidence tampering raises public concern about the system which permitted that result. The attorneys for these petitioners respectfully share these concerns. Apparently a bipartisan Congressional Subcommittee does as well.

The House of Representatives' Subcommittee on Investigations and Oversight, which oversees the Federal Aviation Administration, has engaged in a continuing investigation of the Chicago Center altered document cases since July, 1986. Although the Subcommittee's report and findings have not been issued as of the date this petition is filed, the Subcommittee held public hearings on March 10-11, 1987, following an eight-month investigation on these cases. Virtually without exception the bipartisan record

remarks of the members of the Subcommittee expressed alarm and disgust in describing what occurred in these cases.

One Subcommittee member stated, at the outset of the public session, that "we are kind of in a unique situation here in that, before the hearing begins, we have evidence in fact that there were alterations, forgeries, substitution of documents, and a whole host of other acts that are very, very questionable."¹⁹

Another member remarked, "(i)t is outrageous what we are hearing and what you have developed here..."²⁰ The congressman publically questioned whether there was a "fix" at the MSPB level in these cases,²¹ and further stated "(t)o have this kind of Gestapo-like action by a government agency is something that is outrageous because it is something that I think I personally experienced as a young boy being evacuated from the West Coast only because of my ancestry. It wasn't an excuse in 1942 and it is no excuse in 1981."²²

Still another member commented, "I agree with those who suggest that this is a black day in the history of the administration of justice, and the denial of due process that we went through here today is something that I find very shocking."²³

The Subcommittee Chairman had this "final observation" at the end of that public session:

It appears that a web of actions and of statements had been spun in the Chicago Office, and once the spinning of the web began, it became nigh impos-

19) Subcommittee on Investigations and Oversight Hearings on "Examining the Circumstances Surrounding the 1981 firings of Air Traffic Controllers at the Aurora, Illinois, Air Traffic Control Center," Tr. 3-10-87 at 9.

20) Id. at 60.

21) Id. at 64.

22) Id. at 64, 65.

23) Id. at 112.

sible to extract the principals from that process. And as they proceeded, they more intricately at each step of the way, involved themselves in a turning of the rules and procedures and disregard of the procedures, as I said earlier, that are fundamental to American Jurisprudence.²⁴

Petitioners recognize that the statements of members of a separate ranch of government are given no legal weight, even when they arise from a investigation of the same facts and events in the record reviewed in the lower court. However, such statements do reflect the great public importance attached to the erosion of public confidence in a system which has thus far refused to acknowledge what has occurred here.

2. The Federal Circuit's Decision Turns Both The Review Statute And Hornbook Law On Its Head.

The majority panel's decision in these cases is replete with error.

For example, the express purpose of the Full Board's remand order in 1983 was to examine the process by which the questioned documents were created. The Board stated, "If the record is to speak for itself, we must make sure it is accurate." (App. 120).

Thereafter, at the remand hearing, the agency's main witness Mr. Miller, conceded that the documents were so spoiled with altered entries that "no one with the exception of God could look at these files and tell whether or not they are accurate." (R.H.T. 518-20).

Under these circumstances it was particularly anomalous for the majority to attribute its affirmance to a credibility determination. The petitioners entire attack on the proba-

²⁴) Id. at 181.

tive value derived from this and similar admissions of the agency witnesses. Petitioners did not ask the Board or the court below to discredit this testimony.

In the context of the Chicago Center cases, where hearsay documents comprised the entire agency case, a spoilation of such evidence would occur when the agency witnesses themselves were unable to distinguish genuine entries from the altered ones made by persons having no personal knowledge of the relevant facts. Again, the agency witnesses admitted they could not tell the difference. In cases involving spoilation, it is hornbook law that an adverse inference attaches to the party responsible. See *McCormick on Evidence* (2d ed) Section 273 (fabrication or alteration of documents, destruction or spoilation is an admission by conduct against the party responsible); and see *2 Wigmore on Evidence*. Section 291 (destruction, spoilation and other obstructive conduct creates adverse inference against party responsible).

In contrast to these well-settled principles, the majority panel found that the adverse inference should be imposed on the petitioners, for their failure to come forward with individual proof of their innocence in order to attack a presumed accuracy of the agency hearsay. (App. 19, 28). Although the majority reasoned that this result does not shift the burden of proof, see 5 U.S.C. Section 7701(C)(2)(B), that is precisely what it does.

As noted in the Statement of the Case, supra the individuals involved in the secret, evidence tampering project admitted an awareness that they were creating inculpatory entries for use in MSPB litigation. This Court has declared evidence of this type "inherently unreliable". See *Palmer v. Hoffman*, 318 U.S. 109 (1944), affirming with approval the Second Circuit's decision and analysis in *Hoffman v. Palmer*, 129 F.2d 976 (C.A. 2, 1942) where the court stated:

It follows that the phrase "regular course of business" never covered a regular practice of making records with the purpose of supplying evidence in a highly probable law suit, when those records are made by persons having every possible temptation to misstatements.

The majority opinion recognized that the alternation process resulted in a lack of an identifiable declarant and further recognized that the agency's documents were not "ordinary course business records." (App. 18, 25). However, the majority dismissed the importance of a distinction between hearsay and business records, noting that in MSPB proceedings "evidence need not...fall within an exception to the hearsay rule to be admissible." (App. 25).

However, the evidentiary values underlying business records and hearsay are sharply different even critical to a case of this type. The business record derives an inference of reliability from the independent need for accuracy and truthfulness in the conduct of the enterprise. Fed. R. Evid. 803(b). Ordinary hearsay, on the other hand, rests entirely on the credibility of the out-of-court-declarant for its probative value. *McCormick on Evidence*, (2d ed., Cleary) Section 246. By definition, therefore, hearsay entries from anonymous declarants lack any probative value. *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229-30 (1938).

Clearly the desire to affirm the punishment of those suspected and charged with participating in an unlawful strike should not outweigh the need to protect the process by which guilt and innocence is supposed to be fairly determined.

As this Court stated long ago in *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 323 U.S. 238 (1944), "tampering with the administration of justice in the manner indisputably

shown here involves far more than an injury to (the litigants), it is a wrong against the institutions set up to protect and safeguard the public...."

At a minimum three time-honored principles dictate that no litigant - especially a federal agency - should prevail in a case based entirely on the product of its own chicanery.

3. It Is Impossible To Demonstrate That The Outcome Would Have Been Different If The Oral Reply Right Had Not Been Denied.

As noted above, the MSPB found, and the Federal Circuit agreed, that the oral reply right provided by statute, 5 U.S.C. Section 7513(b)(z), was denied these petitioners. However, the majority found that the petitioners failed to demonstrate the error was harmful by showing that the result might or would have been different.

Petitioners respectfully suggest that such a burden is impossible to meet.

There is little logical distinction from a case in which a judge erroneously holds that a defendant waived a jury trial and thereby forces the accused to proceed with a bench trial. How does the defendant show the appellate court - even in the abstract - how the result might have been different?

The very nature of the oral reply right subsumes the notion that a personal confrontation with the person charged with making or recommending a decision may result in a frank, give and take discussion of the case which may culminate in an understanding between the parties that is never again possible under the statutory review procedures. *Ricucci v. United States*, 425 F.2d 1252, (Ct. Cl. 1972). Even an employee who is otherwise guilty of an offense may plead mitigation and thereby affect the penalty at such a proceed-

ing. *Washington v. United States*, 147 F Aupp. 284 (Ct. Cl. 1957).

How can an attorney, arguing the loss of this right on appeal, establish anything beyond a bare claim that the result might have changed?

This Court has recognized the constitutional dimension of this right. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). However, petitioners respectfully suggest that this right will never be vindicated in federal sector employment cases unless this Court rejects the abstract imponderables required in the lower court's analysis.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

United States Court of Appeals for the Federal Circuit

TERRY L. ANDERSON, ET AL.,
LEIGH ANDERSON, ET AL.,
ALLAN A. BROHOLM, ET AL.,
and RUDOLF C. RADNOFF,

Petitioners,

vs.

DEPARTMENT OF
TRANSPORTATION,
FEDERAL AVIATION
ADMINISTRATION,

Respondent.

Appeal Nos.
85-1146,
85-1824
85-2814
and 85-2821

DECIDED: September 3, 1987

Before BALDWIN, Senior Circuit Judge,¹ NIES and
ARCHER, Circuit Judges.

PER CURIAM.

Petitioners appeal from the decisions of the Merit Systems Protection Board (MSPB or board) sustaining their removals by the Federal Aviation Administration (FAA) from positions as air traffic controllers. We affirm.

1) The Honorable Phillip B. Baldwin assumed Senior Circuit Judge status effective November 25, 1986.

BACKGROUND

A. Proceedings before the MSPB.

The petitioners were removed as air traffic controllers with the FAA for participating in a strike against the United States,² in violation of 5 U.S.C. § 7311 (1982) and 18 U.S.C. § 1918 (1982), and for unauthorized absence (AWOL). All petitioners, except three, were controllers at the Chicago Air Route Traffic Control Center (ZAU).³

Petitioners' appeals to the MSPB were heard as part of a large consolidated proceeding.⁴ The presiding official issued an initial decision on January 18, 1983 sustaining petitioners' removals. The presiding official's decision became the final decision of the MSPB for the two groups of petitioners which elected to appeal from that decision to this court in the cases of *Terry L. Anderson, et al.* (No. 85-1146) and *Leigh Anderson, et al.* (No. 85-1824). See 5 C.F.R. § 1201.113 (1986). A third group of petitioners in the consolidated proceeding filed a petition for review with the full board under the caption, *Behensky, et al. v. Department of Transp., FAA*, No. CH075281F0979 (MSPB February 8, 1984). The board granted the *Behensky* petition and vacated the initial decision on February 8, 1984. The case was remanded to the presiding official for further findings on the "creation, reliability and trustworthiness of certain records" relied on

2) For background regarding the nationwide strike of air traffic controllers in 1981, see *Schapansky v. Department of Transp., FAA*, 735 F.2d 477 (Fed. Cir.), cert. denied, 469 U.S. 1018 (1984).

3) Petitioners Gorgol and Smith were controllers at Green Bay, Wisconsin, and petitioner Strong was a controller at Springfield, Illinois. See No. 85-1146. Gorgol and Smith appeal only on the issue that they were not given a proper oral reply. It does not appear that any issue has been argued on behalf of Strong.

4) This proceeding involving some 450 petitioners was captioned *Former Air Traffic Controllers v. Department of Transp., FAA*, MSPB No. CH075281F0834.

by the FAA to establish a prima facie case of striking against the *Behensky* petitioners. The presiding official on remand, and, in turn, the board, rendered decisions (MSPB No. CH075281F0979REM) on December 17, 1984 and July 5, 1985, respectively, adverse to the petitioners.

Petitioners in *Allan A. Broholm, et al.* (No. 85-2814), members of the *Behensky* consolidation, thereafter appealed to this court, and petitioner *Rudolf C. Radnoff* (No. 85-2821), also a member of the *Behensky* consolidation, filed a separate appeal to this court. The four cases were heard together but not consolidated.

B. Facts.

In the proceedings before the MSPB, the petitioners contended that the FAA records lacked reliability and probative value, resulting in a failure of the FAA to establish a prima facie case of striking and AWOL against the ZAU petitioners. For understanding, we set forth the facts and factual controversy regarding these records in some detail.

1. The Initial MSPB Hearing.

At the initial hearing, the FAA proffered the documentary evidence contained in each petitioner's adverse action file to establish that each had unauthorized absences during the strike, including an unauthorized absence on the deadline shift. Petitioners stipulated to the contents but not the accuracy of these files. These adverse action files were admitted into evidence by the presiding official.

The parties entered into a stipulation as to the testimony that would be uniformly given with respect to each petitioner and his adverse action file by the facility chief at certain locations, including the ZAU facility chief, Mr. Gunter, as follows:

1. The time and attendance records truly and accurately reflect the regularly-scheduled shifts as posted on the watch schedule and any directed shift as assigned to the appellants by a supervisor and reflected in the adverse action file.
2. The appellants did not report for their first regularly-scheduled or directed shift as assigned after 11 a.m. EDT on August 5, 1981, nor any shift prior to that beginning with the 7:00 a.m. shift on August 3, 1981, (that) they were required to report for.
3. The appellants did not, in his opinion, provide any substantive information for their failure to report for the above-referenced shifts.
4. Mr. (facility chief) reviewed and considered all written responses received from appellants prior to making his decision to remove appellants.
5. Mr. (facility chief) reviewed and considered all summaries and recommendations concerning the oral reply prior to making his decision.
6. All notices of intended removal were mailed regular and certified mail.
7. Mr. (facility chief) is not aware of any appellants having contacted the facility prior to their deadline shift to indicate that they were ready to work or were confused as to when to report to work.
8. In deciding that an appellant participated in a strike and was AWOL, Mr. (facility chief) considered that a nationwide strike was in progress, that the appellants were scheduled to

report for work, that they failed to report to work on or at any time prior to their deadline shift and that he believed the appellants offered no substantive information for his/her absence.

Copies of the pertinent parts of three types of documents were contained in each petitioner's adverse action file and were of central importance to the FAA's proof of strike participation and AWOL, namely, (1) watch schedules; (2) personnel sign-in logs; and (3) time and attendance records (T&A records). The watch schedules were normally prepared and posted by the FAA three to four weeks in advance and showed for each employee his shift assignments for one-week periods. Personnel sign-in logs were prepared by a supervisor of a particular shift, usually one day in advance, by inserting on the form the names, taken from the watch schedule, of the employees assigned to that shift. Included on the sign-in log form were columns for the employee to sign or initial opposite his or her name and to record his or her time on and off, and a column headed "hours on leave." In the latter, a notation may indicate hours of sick, annual or other approved leave. Finally, the T&A records represent a cumulation of each employee's attendance, pay and leave status and were derived in part from the watch schedules and personnel sign-in logs.

At the initial hearing, petitioners introduced, as their Exhibit 16, a complete set of what purported to be the original ZAU personnel sign-in logs for the first week of the strike (August 3 through 8, 1981), which had been produced by the FAA in response to petitioners' request. This set of sign-in logs was shown by petitioners to be inconsistent in some 100 instances with the sign-in logs contained in the petitioners' adverse action files. Petitioners asserted that those discrepancies were the result of "doctoring" by the FAA to sup-

port the removal actions it had taken and, as a consequence, requested that all of the ZAU cases be reversed.

Although not specifically discussed by the presiding official, petitioners' counsel submitted to the presiding official at the close of argument a color-coded list of the alleged inconsistencies between the adverse action file copies of the sign-in logs and Exhibit 16, which petitioners' counsel explained as follows:

The blue notations denote those individuals who had AWOL added to their orders [sic, logs] that did not appear on the sign-in logs for certain dates. The red denotes those individuals who had annual leave on the original sign-in log . . . and cancelled on their sign-in logs that was [sic] contained in the adverse action file, and the persons [sic] in green had his name added to a sign-in log where his name did not actually appear on that sign-in log on the original.

Thus, according to the petitioners, the discrepancies in the sign-in logs consisted of three types of changes, (a) the notation "AWOL" was inserted in the blank space in the last column, (b) the "AWOL" notation was substituted for an annual leave or sick leave notation, and (c) a controller's name was added to the logs.

The presiding official in the initial decision found the documentary discrepancies of some significance because the facility chief, Mr. Gunter, had testified he relied on the sign-

in logs, rather than personal knowledge, to determine whether a particular petitioner appeared for duty for scheduled shifts during the strike. Further, according to the presiding official, Mr. Gunter was unable to explain the discrepancies other than to make a vague statement that the file copy logs were "updated."⁵ However, in the absence of any evidence showing that the logs were "doctored" for a specific purpose, the presiding official rejected petitioners' argument that the logs were altered by the agency in an improper attempt to influence the outcome of the proceedings and found that the logs could not be totally disregarded as probative evidence. The presiding official noted that his "failure to exclude the agency-submitted sign-in logs did not prejudice the ZAU appellants in the presentation of their cases since these appellants could have (and many, in fact, did) dispute [sic] the fact of their alleged absences from their regularly-scheduled tours of duty or otherwise explained the reason(s) for their absences in their hearing before the Board." The presiding official then concluded that, because the adverse action file copies of the logs could not be summarily disregarded, Mr. Gunter's live and stipulated testimony concerning the non-appearance of the ZAU petitioners at their deadline shifts established a prima facie case of strike participation as to all of the petitioners involved in that proceeding. Each individual's rebuttal and affirmative defenses raised at the initial hearing were then considered by the presiding official.

5) The FAA sought to have another FAA official, Mr. Miller, testify concerning the apparent changes in the logs. All FAA witnesses were ordered sequestered during the hearing, and petitioners' counsel objected to Mr. Miller's testimony because he had acted as technical advisor to the FAA counsel during the hearing and had not been sequestered. The presiding official sustained this objection as well as petitioners' objection to the FAA's motion to permit the record to remain open for further testimony concerning the changes in the documents.

2. The Board Decision

As previously noted, a group of petitioners (including those here in the *Broholm* and *Radnoff* appeals) appealed the initial decision to the full board. The board remanded the case to the presiding official because petitioners "have demonstrated that the agency did not in every case create the records in question in the usual course of business, but under unusual circumstances and with some inaccuracy." In doing so, the board held that the presiding official did not err in admitting the FAA's attendance and pay records into evidence, stating:

Despite the fact that the records are in some instances incomplete, inconsistent, and contain alterations and succeeding entries, the [FAA] established through the testimony of facility chief Gunter that they were regularly created in conjunction with the operation of ZAU and they were relied upon in managing its work force.

The question, according to the board, was what probative value to ascribe to the admitted documents. This, it said, depended on their reliability which could be found by examining the circumstances of the documents' creation to see if there was an inherent probability of trustworthiness. In remanding, the board noted that in *Borninkhof v. Department of Justice*, 5 MSPB 150, 156-57 (1981), it had listed eight factors to be considered in assessing the reliability of written hearsay. Finally, the board stated:

A majority of the ZAU appeals, however, may contain records consistent enough to conclude that more likely than not an individual was striking and AWOL on at least one of the days charged. See Schapansky, supra. Consequently, this case is remanded to the presiding official for further adjudication consistent with this Opinion and Order. On remand, the presiding official may wish to con-

sider the need for eyewitness testimony explaining the process by which the records were created. If the written record is to speak for itself we must be sure that it is accurate.

3. Remand Hearing and Decisions.

At the remand hearing, the FAA presented the testimony of the Facility Evaluations Officer at ZAU, Mr. Miller,⁶ together with the testimony of several area supervisors regarding the preparation and use of the pertinent documents — watch schedules, sign-in logs and T&A reports. Mr. Miller was in charge of the so-called "war room," which was set up during the second week of the strike to deal with administrative paperwork associated with removal actions, oral replies, and the initial hearing. Also testifying were individuals who had been involved in "war room" activities and Mr. Shewfelt, Manager of the Labor Relations Branch for the FAA's Great Lakes Region, who had certified the adverse action files to the MSPB.

Petitioners' counsel cross-examined the FAA's witnesses and introduced certain documents seeking to discredit the FAA's records and its witnesses. In the course of the cross-examination of Mr. Miller, the FAA attorney, in order to avoid prolonging the questioning related to the FAA documents, introduced of record the following stipulation:

Paragraph 1. In certain instances the FAA made amendments to 304's (sign-in logs) in Agency's Exhibit 1 for certain controllers after their oral reply.

Paragraph 2. Among these amendments to the 304's was the addition of some printed names of controllers in this proceeding to their 304's, which the agency asserts was done to make the 304 consistent with the watch schedule.

6) See supra note 4.

Paragraph 3. These changes could have occurred as late as November, 1981.

Paragraph 4. These amended 304's were then copied and substituted for those in the files, which (files) eventually were transmitted to the Board as the appellants' adverse action files.

Paragraph 5. The agency does not stipulate that these amendments were material or relevant to the controllers' removals.

In his remand decision of December 17, 1984, the presiding official, although noting that there were numerous differences between the original watch schedules and the copies of the watch schedules contained in the adverse action files, found that "no changes were made to any appellant's scheduled shifts during the applicable period." Based on the testimony of Mr. Miller and other supervisors as to the procedures for posting and amending watch schedules and the consistency of the documents as they pertained to petitioners, the presiding official found that the watch schedules were reliable and, in the absence of any specific challenge, accurately reflected the petitioners' shift assignments during the period in question.

As to the sign-in logs, the presiding official again noted that there were differences pointed out during the hearing but found that changes existed with respect to the logs of only three individuals involved in the remand proceeding.⁷ The presiding official also stated that the area supervisors verified the authenticity of the applicable logs for the vast

7) These individuals, Nelson, Lockhart and Schultz, were found by the presiding official not to be prejudiced by the addition of their names to the sign-in logs because there was testimony that the omissions were inadvertent, such an inadvertent error was not an uncommon occurrence, and none of the three individuals alleged that he appeared on the dates in question.

majority of the petitioners in the remand proceeding. Based on that testimony and his personal examination of all of the logs for the applicable period, the presiding official found an "inherent probability of trustworthiness."

With respect to the T&A records, the presiding official said the record reflects that amended reports were prepared during and for months after the strike, that the vast majority of the amendments dealt with pay periods subsequent to the employee's deadline shift and were therefore irrelevant, and that, in light of the findings regarding the watch schedules and sign-in logs, the T&A appropriately reflected each petitioner's status during the applicable period.

Finally, the presiding official made the following findings in reaching the conclusion that petitioners were absent without authorization during the strike and that each failed to report for his or her deadline shift:

I am not persuaded by appellants' arguments concerning the credibility of Messrs. Miller and Shewfelt, and the alleged forgery, fraud and misrepresentations on the part of the agency. I find no persuasive evidence that any agency official perjured himself, attempted to "make" or "rig" a case against an appellant, or otherwise committed any act which might be considered fraudulent. In some measure, the agency's records were not created in the ordinary course of business. However, during the summer and fall of 1981, agency "business" was far from "ordinary". Given the totality of circumstances, and in light of my findings above, I find that the agency's documentary evidence is, in fact, reliable.

Finding that the FAA had established a prima facie case and that none of the petitioners presented persuasive evidence in rebuttal, the presiding official upheld the charges of strike participation and AWOL as to all of the

petitioners in the remand proceeding and sustained their removals.

In denying petitions for review of the remand decision on July 5, 1985, the board determined that the presiding official did not err or abuse his discretion in permitting Mr. Miller to testify at the remand hearing, even though he had not been sequestered or allowed to testify at the initial hearing. The board responded to the petitioners' contention that the agency had destroyed certain original records by stating that

the presiding official evaluated documents, weighed their probative value, and determined that any subsequent changes on the watch schedules contained in the adverse action files were made while working controllers were handling the increased workload occasioned by the strike. The presiding official found the documents reliable and an accurate reflection of appellants' shift assignments during the period in issue. *Bor-ninkhof v. Department of Justice*, 5 MSPB 150 (1981). In any event, a close examination of these documents reveals that no changes were made to any appellant's scheduled shifts during the applicable period of August 3, 1981 through August 5, 1981. The Board finds no error in the presiding official's evaluation of the reliability of these documents. [Footnote omitted.]

OPINION

I.

This court's standard for reviewing decisions of the MSPB is defined and limited by statute. The decisions appealed herein must be affirmed unless they are

- (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

- (2) obtained without procedures required by law, rule, or regulation having been followed; or
- (3) unsupported by substantial evidence.

5 U.S.C. § 7703(c) (1982). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. National Labor Relations Bd.*, 305 U.S. 197, 229 (1938). In *Brewer v. United States Postal Service.*, 647 F.2d 1093, 1096 (Ct. Cl. 1981), our predecessor court said that "[i]n determining whether the Board's decision is supported by substantial evidence, the standard is not what the court would believe on a de novo appraisal, but whether the administrative determination is supported by substantial evidence on the record as a whole."

The FAA had the burden of proving strike participation and AWOL by petitioners by a preponderance of the evidence. 5 U.S.C. § 7701(c)(1)(B). A preponderance of the evidence is defined by the MSPB regulations as:

[T]hat degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

5 C.F.R. § 1201.56(c)(2).

The charge of striking is proven when it is shown that the employee withheld his services in concert with others. *Schapansky*, 735 F.2d at 482. In *Schapansky*, this court held that "[p]roof of a wide-spread strike of general knowledge, together with proof of . . . absence without authorization or explanation during the strike," constitutes a prima facie case of strike participation. *Id.* at 482. An un rebutted prima facie case, moreover, amounts to proof by a preponderance of the

evidence. See *Hale v. Department of Transp., FAA*, 772 F.2d 882, 886 (Fed. Cir. 1985). The charges of absence without leave are supported by the same evidence found to support the charges of striking. See *Schapansky*, 735 F.2d at 484.

In these appeals it is undisputed, and the presiding official found, that adequate proof of the strike of general knowledge was presented. The petitioners contend, however, that the second part of the *Schapansky* test — absence without authorization or explanation — was not proven. They point to the fact that the documents relied on by the FAA to show the absence of petitioners were altered or added to after their creation. Arguing that these alterations were not adequately explained by the FAA's witnesses, petitioners assert that the documents are untrustworthy hearsay and inadequate to establish a prima facie case of absence without authorization.

It has long been settled that hearsay evidence may be used in administrative proceedings and may be treated as substantial evidence even without corroboration if, to a reasonable mind, the circumstances are such as to lend it credence. *Hayes v. Department of the Navy*, 727 F.2d 1535, 1538 (Fed. Cir. 1984) (and cases cited therein). In this regard, the very purpose of the remand by the board, and the remand hearing before the presiding official, was to assure the board that the FAA's documentary evidence was reliable and trustworthy with respect to individual petitioners.

II.

Because of the different procedural histories between the *Broholm* (No. 85-2814) and *Radnoff* (No. 85-2821) appeals and the two *Anderson* appeals (Nos. 85-1146 and 85-1824), we are faced with different records in the two groups of cases. We therefore will discuss each group separately, first considering the *Broholm* and *Radnoff* appeals.

The petitioners' attack on the documents and the underlying record-generating process is based on general allegations of evidence tampering and false testimony by FAA officials. There is no question that changes and additions were made to some of the FAA documents. This was brought out by the petitioners during questioning of the FAA witnesses and by pointing to the documentary inconsistencies. In addition, a stipulated admission to that effect was made by the FAA's counsel. Nevertheless, petitioners' generalized charges of tampering and false testimony are totally inadequate to counteract the specific findings made by the presiding official on remand and approved by the full board.

The presiding official on remand concluded again that there was no evidence of fraud, forgery, or misrepresentation on the part of the agency, nor any persuasive evidence that any agency official perjured himself, attempted to make or rig a case against any appellant, or otherwise committed any act which might be considered fraudulent. In an attempt to attack these findings, the petitioners have detailed a number of instances in which they contend the testimony of agency witnesses is inconsistent or conflicting. However, the presiding official credited the testimony of Messrs. Miller and Shewfelt, was unpersuaded by the arguments of agency forgery and fraud, and relied on the testimony of the area supervisors as verifying the authenticity of the logs. That some parts of a witness' testimony may be attacked is a common phenomenon, but it supplies no basis for holding that the fact-finder is not entitled to credit other parts of that witness' testimony. *DeSarno v. Department of Commerce*, 761 F.2d 657, 661 (Fed. Cir. 1985). We have examined carefully the discrepancies noted by petitioners and are unable to conclude that we should second guess the credibility determinations of the presiding official, based as they are on the demeanor of the witnesses during direct and cross-examina-

tion. See *Griessenauer v. Department of Energy*, 754 F.2d 361, 364 (Fed. Cir. 1985). See also *Hambusch v. Department of the Treasury*, 796 F.2d 430, 436 (Fed. Cir. 1986) (credibility determinations are "virtually unreviewable").

The testimony of the FAA officials, being credible, provides substantial evidence to support the board's findings that there was no attempt on the part of the FAA to make or rig a case against any petitioner or otherwise commit a fraudulent act. Thus, the FAA's documentary evidence cannot be summarily rejected as unreliable and non-probative, as petitioners contend, based on general allegations of tampering.

Because of their reliance on a broadside attack against the FAA's case, petitioners have also failed to address or counter in any way the crucial findings of the presiding official on the accuracy and the reliability of the documents as they relate to the individual petitioners involved in the remand proceeding. The presiding official found that no changes were made to any petitioner's scheduled shifts and that the watch schedules were reliable and accurately reflected the petitioners' shift assignments. These findings were made by the presiding official after hearing the testimony of the FAA officials, including their cross-examination, and after reviewing the documents for consistency.

Petitioners' response to these findings is that the watch schedules had alterations and that the FAA was unable to produce ancillary documents, such as the "swap book" in which controllers' agreements to swap shifts are usually recorded, because they were no longer available at the time of the hearing. As a result, the accuracy of all the shift assignments could not be verified. Petitioners, however, made no specific allegations of changes in shift assignments for any of the petitioners in the remand proceeding and the presiding

official's finding that there were no such changes remains unchallenged. If there were in fact errors in the shift assignments as to those petitioners, they could have identified them to the FAA or in the MSPB proceedings. In the absence of any showing of a specific mistake for any individual petitioner, the presiding official's finding of accuracy in the watch schedule shift assignments must stand.

The second important finding relates to the sign-in logs where, despite the many differences claimed by petitioners to exist between the original logs and the copies contained in the adverse action files, the presiding official determined that a change was made only for three of the petitioners in the remand proceedings. In the three cases, the difference was that the employee's name had been added to a sign-in log because it had been inadvertently omitted for a shift to which the employee was assigned per the watch schedule. The presiding official determined that these individuals had not been prejudiced by the addition of their names to the logs. Significantly, no allegation of prejudice has been made on appeal on behalf of these individuals, nor is there any indication that they were either not assigned to that particular shifts or were in fact present at such shifts.

Again, there is no specific challenge on behalf of any individual petitioner in this appeal to the presiding official's determination. The petitioners were content to rely solely upon their general allegations that the discrepancies in the logs, even though the discrepancies did not implicate petitioners in this appeal other than the three whose names were added to the logs, made the logs, in toto, untrustworthy hearsay. After noting that the witnesses testified that no signatures were erased from any sign-in logs, that none of the petitioners had alleged that he or she did in fact appear on the dates in question, and that supervisors verified the authenticity of the applicable logs for the vast majority of the

petitioners, the presiding official found, after examining all of the logs for the applicable period, an "inherent probability of trustworthiness." Accordingly, it must be concluded that to the extent there were changes in, or additions to, the logs, the petitioners were unaffected by the changes, and that for purposes of these appeals the logs are probative evidence of the petitioners' absences for their assigned shifts.

The petitioners in the *Broholm* appeal have also set out specific arguments for claiming that the documentary evidence was insufficient to establish a prima facie case of absence without authorization. We find all of them without merit and substantially covered above except as discussed below.

Petitioners contend that the documentary evidence submitted to the MSPB was not the same as that relied upon by the FAA as the basis for removing petitioners. However, the two critical features of the documents — petitioners' shift assignments and absence of petitioners' signatures — were found by the presiding official to be unchanged, except for the three names added to the logs to correct inadvertent errors. We must conclude that there is not a sound basis for petitioners' assertion. Further, petitioners have not shown that the irregularities in the documents otherwise complained of having resulted in harmful error. See *Adams v. Department of Transp., FAA*, 735 F.2d 488, 490 n.3 (Fed. Cir. 1984) and concurring opinion of Judge Nies, 735 F.2d at 495.

Petitioners also argue that, although hearsay is admissible in MSPB proceedings, the documents here lack an identifiable declarant and "do not even qualify as hearsay." Petitioners' assertion that the documents are akin to "mere rumor" is contrary to the specific findings of the MSPB and the testimony clearly indicating that they were created in conjunction with the operations of the Chicago facility and

relied on in managing that work force. In this regard, the presiding official stated that while in some measure the agency records were not created in the ordinary course of business during the summer and fall of 1981, the agency "business" was far from "ordinary." We cannot say that the presiding official erred in concluding that, given the totality of the circumstances, the agency's documentary evidence was, in fact, reliable.

Petitioners assert that the AWOL entries, which were, for the most part, entered on the sign-in logs at a later date, were relied on by the FAA as its evidence of absence without authorization. There is no indication, however, that weight was given to the AWOL notation. Moreover, the presiding official in the remand opinion concluded, albeit in the context of the three added names to the logs, that the significant or probative feature of the logs was the presence or absence of the employee's signature. Since no petitioner has contended that he was not absent or was not scheduled for duty for any of the shifts at issue in this appeal, no prejudicial effect on any petitioner has been shown by the AWOL notation even it entered for any petitioner in these appeals. As already noted, the presiding official found no changes in the logs relating to the petitioners here, except for the three whose names were added to the logs.

The board's conclusion and determination that the FAA established a prima facie case of strike participation with respect to each petitioner is also supported by the adverse inference that may be drawn from the failure of any of the petitioners to come forward, either at the board hearings or at the agency hearing, to affirm that they were not absent or that their scheduled shifts were incorrectly recorded by the agency. As stated in *Adams*, 735 F.2d at 492,

[p]etitioners declined twice, however, to explain their absences, once during the agency removal

proceedings and again during the Board hearing. The first failure to deny the charges left those absences unauthorized and unexplained, thereby adding to the sufficiency of the agency's prima facie case. It is the Board's decision we review, and the petitioners' silence before the Board, after the agency had established a prima facie case, fully warranted the Board's drawing of an adverse inference. "Silence is often evidence of the most persuasive character."

These are appeals of cases where, as in *Hale*, 772 F.2d at 885-86, "[p]etitioners deliberately chose to present no rebuttal evidence, apparently concluding that a prima facie case had not been established and that they could prevail by that stratagem. . . . An un rebutted prima facie case is necessarily, by definition, a 'preponderance' of the evidence. See *Schapansky*, *supra*, 735 F.2d at 483."

III.

The remaining issues in *Broholm* (No. 85-2814) and *Radnoff* (No. 85-2821) may be disposed of without extended discussion.

(1) Petitioners contend that the presiding official erred in not imposing sanctions, pursuant to 5 C.F.R. § 1201.43, on the respondent. Since we have concluded that the presiding official correctly determined that the FAA established a prima facie case of striking and AWOL, in part, upon the basis that the agency records were reliable and that no act was committed by an agency official which might be considered fraudulent, we affirm that the board acted properly in denying sanctions.

(2) In *Broholm*, petitioners have raised procedural issues regarding the pretermination hearings, citing the Supreme Court's decision in *Cleveland Bd. of Education v. Loudermill*, 105 S. Ct. 1487 (1985). These contentions have

been effectively disposed of by this court's decisions in *DeSarno*, 761 F.2d at 660 (*Loudermill* does not enlarge upon the procedural rights due federal employees under the Civil Service Reform Act) and *Handy v. United States Postal Serv.*, 754 F.2d 335, 337 (Fed. Cir. 1985) (it is petitioners' burden to prove harmful procedural error in the oral reply process). Petitioners have failed to show that absence of the alleged procedural error might have produced a different result. See *Shaw v. United States Postal Serv.*, 697 F.2d 1078, 1080-81 (Fed. Cir. 1983); *Adams*, 735 F.2d at 490 n.3, 495.

(3) The issue raised in the *Radnoff* appeal that petitioner was denied Presidential amnesty by being charged with strike participation prior to his deadline shift has been fully considered and decided in *Anderson v. Department of Transp., FAA*, 735 F.2d 537, 540 (Fed. Cir. 1984); *Dorrance v. Department of Transp., FAA*, 735 F.2d 516, 520 (Fed. Cir. 1984); *Adams*, 735 F.2d at 490-91.

With respect to the two *Anderson* appeals (Nos. 85-1146 and 85-1824), these petitioners did not seek full board review of the initial presiding official's decision, and it is that decision which is challenged here. These petitioners seek reversal on the ground that the presiding official erred in the holding that the documentary evidence on which Facility Chief Gunter based his removal decisions was probative. Further, they maintain that a remand (as ordered by the board in *Behensky*) is inappropriate for the reason that the agency should not be given a second chance to prove its case. We need not address the latter issue since we conclude that the presiding official properly could credit Mr. Gunter's live and stipulated testimony, including his testimony based on the documents contained in each petitioner's adverse action file.

The presiding official ruled that Mr. Gunter's stipulated testimony⁸ constituted un rebutted evidence that each petitioner failed to report for his/her first regularly-scheduled shift following 11:00 a.m. EDT on August 5, 1981, and, therefore, found that each had withheld his/her services from the agency during the strike. Mr. Gunter further testified that the records were regularly created in conjunction with the operation of ZAU, and they were relied upon in managing its work force.

Because Mr. Gunter relied on the sign-in logs, rather than personal knowledge, to determine whether an employee appeared for his or her scheduled shift during the strike, the presiding official expressly stated that he gave careful consideration to petitioners' contentions concerning the validity of these documents. Mr. Gunter was unable to explain the discrepancies between copies purportedly of the same sign-in log except to say that some were "updated." However, because there was not evidence showing that the logs were "doctored" or altered by the FAA in an improper attempt to influence the outcome of the hearing, as asserted by petitioners, the presiding official stated that he could not disregard them totally as probative evidence. On that basis he concluded that his determination that the FAA's *prima facie* case was established by Mr. Gunter's live and stipulated testimony should not be disturbed.

The issue before us is whether there is substantial evidence in the record to support the presiding official's determination that the agency made a *prima facie* case of strike participation for each petitioner. See 5 U.S.C. § 7703(c). Petitioners argue that the documentary evidence should be held inadmissible, which would leave the record devoid of evidence to support the charges. Even if admis-

8) The stipulated testimony appears at pp. 4-5, supra.

sible, petitioners assert that the evidence is insufficient to establish a prima facie case of strike participation and AWOL charges against any ZAU controller.

Throughout their briefs, petitioners argue that the government altered its records to "fabricate" evidence against petitioners and that its actions constitute a "fraud on the court." The presiding official found no evidence "that the agency 'doctored' these amended logs in order to support the removal actions it had taken." Petitioners, nevertheless, label the sign-in logs in all files as "false," "manufactured evidence," "secretly insert[ed] amendments," and the like, and at the same time urge that the presiding official's ruling on "motive" is immaterial. More specifically, the principal argument appears to be that a change from "approved leave" to "AWOL" on the sign-in logs could somehow be evidence of AWOL which influenced the presiding official's decision to uphold the charge.

Nothing in the presiding official's analysis lends support to that argument. The government argues that a notation of AWOL added to the sign-in logs reflects no more than the agency's view of the matter. We agree. The presiding official clearly recognized that being AWOL was an issue, and he ruled on each of the charges de novo, overturning a number of the agency's removal decisions. Indeed, with respect to the one example singled out by petitioners to illustrate their position that evidence was "manufactured," namely, the removal of L. Rodney Peterson, the presiding official set aside Peterson's removal despite the agency's records which indicated that he was AWOL. Accordingly, because there is no evidence of evidence tampering — not even a suggestion that a signature was expunged from a sign-in log to manufacture a case against someone — we affirm the presiding official's finding that the records were not "doctored" to manufacture evidence for the MSPB proceedings.

The petitioners argue that the large number of unexplained discrepancies and the absence of any original unaltered record render any sign-in log in a petitioner's file inadmissible. Alternatively, if technically admissible, the records are, per petitioners, too "unreliable" to constitute substantial evidence of the charges against them.

In support of their view that the documentary evidence is totally unreliable, petitioners rely on the decision of the full board in *Behensky*, previously discussed, from which they extract the board's statement that there were "numerous alterations and inconsistencies in the agency's documentation." *Behensky*, slip op. at 4. In view thereof, petitioners assert that the records should have been excluded.

The *Behensky* decision does not support petitioners' argument here that the records were improperly received in evidence. On the contrary, in *Behensky* the board specifically held:

We conclude that the presiding official did not err in admitting the agency's attendance and pay records into evidence. Despite the fact that the records are in some instances incomplete, inconsistent, and contain alterations and succeeding entries, the agency established through the testimony of facility chief Gunter that they were regularly created in conjunction with the operation of ZAU and they were relied upon in managing its work force. [Emphasis added.]

Id. at 5.

From our review of the record, we also reach the conclusion that the records were properly admitted. The documents are of the type which have routinely been accepted and used to establish a prima facie case of strike participation. See *Dorrance v. Department of Transp., FAA*, 735 F.2d 516, 519 (Fed. Cir. 1984); *Hale*, 772 F.2d at 886. While

petitioners argue that in their appeals the records may not be treated as "business records" prepared in the ordinary course of business because of the subsequent changes, evidence need not, in MSPB proceedings, fall within an exception to the hearsay rule to be admissible. See *Dorrance*, 735 F.2d at 519; *Hayes*, 727 F.2d at 1538. Rather, the board and this court are concerned with the reliability of the hearsay to establish the charges against an employee.

The board noted in *Behensky* that the records were created with "some inaccuracy." *Behensky*, slip op. at 6. The demonstrated inaccuracy, however, did not lead the board to conclude that the records were so wholly unreliable that they could not serve as evidence against anyone. Nor did the board hold that additional testimony was necessary to establish their reliability. On the contrary, the board stated, "A majority of the ZAU appeals, however, may contain records consistent enough to conclude that more likely than not an individual was striking and AWOL on at least one of the days charged." *Id.* at 6-7.

That the board in *Behensky* chose to have the presiding official re-review the records for consistency as to individual petitioners and suggested that the presiding official on remand might take additional testimony was a matter within its discretion. The presiding official is part of the board, and the board is not required to review the presiding official's decision limited by a standard of review comparable to that imposed on this court. Our role is severely circumscribed in reviewing a presiding official's decision as compared to that of the board.

With regard to the specific inconsistencies raised by petitioners, the predicate for their argument of unreliability is the addition of names to the watch schedules and the sign-in logs, as well as the changes in annual leave designations

to AWOL. These changes, per petitioners, totally destroy the probative value of the documents in every ZAU adverse action file on which Mr. Gunter based his removal decision. We disagree.

Petitioners improperly ask us to resolve the ZAU cases as a group rather than individually. While their challenges to the removal actions were consolidated for convenience of trial, each controller has a separate claim for wrongful removal. Not one of the petitioners in the instant cases has asserted that information contained in his or her adverse action file was wrong either with respect to a shift assignment or his or her absence from a scheduled shift. No petitioner here has asserted, for instance, that his or her name was improperly added to a sign-in log or that he or she did not receive notice of being scheduled for duty during the period in question. Similarly, no petitioner asserts that the sign-in logs did not accurately reflect his or her non-appearance during a scheduled shift, i.e., that his or her signature was somehow expunged or that he or she inadvertently neglected to sign in.

Contrary to petitioners' argument, it was not necessary that the presiding official make a specific finding as to the accuracy and reliability of the documentary evidence as it related to each individual petitioner in the absence of some proof of error as to that individual. If the FAA had erroneously "updated" an individual petitioner's T&A record, that person had the burden of bringing such error to the attention of FAA during its removal proceedings or at least to the attention of the presiding official at the board hearings.

Also contrary to petitioners' argument, the issue presented here was not decided differently by the board in *Gerbitz v. Department of Transp., FAA*, No. CH075281F1637 (MSPB September 30, 1983). According to petitioners the

sole difference between *Gerbitz* and the cases presented for review here are the number of petitioners involved. That is unequivocally wrong.

In *Gerbitz*, the sole petitioner did not remain silent in the face of strike charges, as did petitioners here. The dispute in *Gerbitz* was over the amount of leave Gerbitz had been granted; seven days or seven hours, and whether his leave had been cancelled. Gerbitz testified at his board hearing that "he received approval of his request for seven days of annual leave on July 31, 1981 covering the period August 3rd through August 9th, 1981." *Id.*, slip op. at 1. While his supervisor, Salinas, testified he granted Gerbitz only seven hours of annual leave, a contemporaneous memo prepared by Salinas supported Gerbitz's claim. There was also conflicting testimony over whether Gerbitz's leave had been cancelled. In view of the entire record, the board held that the probative value of the records which showed Gerbitz scheduled but absent was greatly reduced. In reversing Gerbitz's removal, the board ruled:

As we held in *Borninkhof v. Department of Justice*, 5 MSPB 150, 157 (1981), hearsay evidence, although sufficient to meet a substantial evidence standard, may not be sufficiently probative in light of contradictory live testimony to sustain the agency burden of proof by a preponderance.

Id., slip op. at 4 (emphasis added). Petitioners here can draw no support from the ruling in *Gerbitz*. No petitioner here contradicted the hearsay evidence with his or her own contradictory live testimony challenging his or her record. Further, as we noted in the *Broholm* and *Radnoff* appeals, an adverse inference may be drawn from petitioners' conscious decision to remain silent at both the agency and board level rather than to affirmatively assert the incorrectness of their

scheduled shifts or their presence on duty. See Adams, 735 F.2d at 492.

Petitioners argue that requiring them to come forward with evidence of specific error improperly shifts the burden of proof with respect to hearsay evidence and that it was incumbent on the government to establish the "accuracy" of its records in order to establish a *prima facie* case against any petitioners. Again, we must disagree. If the government were required to prove the accuracy of every entry in order to use any part of the record as evidence, the hearsay evidence itself would be merely cumulative and unnecessary. In any event, the accuracy of an entry on the records for a particular individual, while critical to his case, is irrelevant or harmless error as to another if the records correctly show the latter's absence during a scheduled shift. Since the changes relate to individuals, not the group as a whole — indeed, no change at all appears in the records of the majority of controllers — a requirement that individuals put forth some proof of error in their individual records is reasonable under the circumstances. A requirement for coming forward with evidence does not shift the overall burden of proof. See Schapansky, 735 F.2d at 482.

From our review of the record, we conclude that the presiding official's finding that the agency established a *prima facie* case of strike participation against each of the *Anderson* petitioners is supported by substantial evidence. Having been given ample opportunity before the presiding official to establish that the records indicating, *prima facie*, a petitioner's unauthorized absence during a strike was inaccurate, none offered a personal challenge. With no countering evidence, the agency's proof of a *prima facie* case of strike participation under *Schapansky* amounted to a preponderance of the evidence. See Hale, 772 F.2d at 886; *Schapansky*, 735 F.2d at 483.

V.

In both *Anderson* appeals, procedural issues regarding pretermination hearings have been raised, as they were in *Broholm*. Our discussion and application of this court's decisions supra at 22-23 is equally applicable here.

CONCLUSION

The decisions of the board in Nos. 85-1146, 85-1824, 85-2814, and 85-2821 are affirmed.

AFFIRMED

United States Court of Appeals for the Federal Circuit

TERRY L. ANDERSON, ET AL.,
LEIGH ANDERSON, ET AL.,
ALLAN A. BROHOLM, ET AL.,
and RUDOLF C. RADNOFF,

Petitioners,

v.

DEPARTMENT OF
TRANSPORTATION
FEDERAL AVIATION
ADMINISTRATION,

Respondent.

Appeal Nos.
85-1146,
85-1824
85-2814
and 85-2821

BALDWIN, Senior Circuit Judge, dissenting.

I must dissent from the majority's affirmance of the board's determination that the FAA has carried its burden of demonstrating a prima facie case of strike participation and AWOL by a preponderance of the evidence. 5 U.S.C. § 7701(c)(1)(B); 5 C.F.R. § 1201.56(a)(1)(ii). The issue is whether there is substantial evidence in the record to support the board's decision that the agency made a prima facie case of strike participation for each petitioner. 5 U.S.C. § 7703. To establish the charge of strike participation, the FAA came forward with proof of a strike of general knowledge coupled with documents purporting to establish absence

without authorization by each of the petitioners.⁹ Much of that documentation was incomplete, inconsistent, and/or altered after-the-fact. Those records having not been prepared in the ordinary course of business, the board should have concluded that those records could not serve as evidence against anyone.

This unreliable documentation created a record that is so flawed, in the first instance, as to undermine its probative value, and prevent the establishment of a prima facie case. Such records are hearsay which could be acceptable in administrative hearings to provide a substantial evidence basis for agency charges if, to a reasonable mind, the circumstances are such to lend it credence. *Hayes v. Department of the Navy*, 727 F.2d 1535, 1538 (Fed. Cir. 1984). The alterations and inconsistencies in the documents, however, are circumstances which destroy the acceptability of the entire record.

Although the majority recognizes discrepancies in the record, primary weight is accorded to the determination by the board that there was no attempt by the FAA to commit a fraudulent act, a forgery, a misrepresentation, or to commit perjury. I take no issue with the board's "virtually unreviewable" credibility determination regarding the lack of any improper intent on the part of the FAA. In focusing on the motives of the FAA, however, the board has missed the key issue of the reliability of the record upon which the FAA case is based.

9) Charges of absence without leave are supported by the same evidence that would support charges of strike participation. See *Schapansky v. Department of Transp., FAA*, 735 F.2d 477, 484 (Fed. Cir. 1984). Unrebutted evidence showing that an employee withheld his service in concert with others would amount to proof by a preponderance of the evidence. *Hale v. Department of Transp., FAA*, 772 F. 2d 882, 885 (Fed. Cir. 1985).

Although deference is to be accorded to an administrative determination, we, the reviewing court, retain a responsibility to scrutinize the entire record and to reverse or remand a decision which is not supported by substantial evidence. The circumstances surrounding creation of the FAA's documentation has undermined the probative value of the evidence against petitioners. The FAA has failed to provide reliable documentation as a substantial evidence basis for a prima facie case of absence without authorization.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
CHICAGO REGIONAL OFFICE

FORMER AIR TRAFFIC CONTROLLERS
REPRESENTED BY THE LAW FIRM OF
LEIGHTON, CONKLIN, LEMOV, JACOBS
AND BUCKLEY

Appellants

v.

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

Respondent

HEARING HELD: Between November 1, 1982
and December 3, 1982 in
Chicago, Illinois

DECISION FILED: January 18, 1983

PRESIDING OFFICIAL: Stephen E. Manrose
Room 3100
230 South Dearborn Street
Chicago, Illinois 60604

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INTRODUCTION

By an order issued February 23, 1982, as amended by orders issued on August 31, 1982, November 1, 1982, and December 1, 1982, the Board consolidated the appeals of 451 former air traffic control specialists who were employed at 38 different air traffic facilities under the jurisdiction of the Chicago Regional Office of the Merit Systems Protection Board. The appellants were separated from their positions on various dates during the period of August through October, 1981, by the agency's application of adverse action procedures.

JURISDICTION

Section 7701 of title 5 of the United States Code provides federal employees with a right of appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. The appellants, who were non-probationary employees in the competitive service, have statutory and regulatory rights of appeal to the Board from the removal actions. 5 U.S.C. 7511(a)(1)(A), 7512, 7513(d); 5 C.F.R. 752.401(a), .401(b)(1), .405(a).

ANALYSIS AND FINDINGS — MERITS OF THE CHARGES

Each appellant in the consolidated group was removed for the same two reasons. The first charge alleges that appellants violated 5 U.S.C. 7311, which provides that an individual may not hold a position in the Government of the United States "if he...participates in a strike against the Government of the United States..." and 18 U.S.C. 1918, which provides that participation in a strike against the United States Government is a crime for which a sentence of imprisonment can be imposed. The supporting specifications state that beginning at approximately 7:00 a.m. EDT on August 3, 1981, a nation-

wide strike of air traffic controllers against the United States Government occurred and that appellants who failed to report for duty as scheduled (at various times on or after August 3, 1981), participated in the strike. The second charge alleges that appellants were "absent without authorization" (AWOL). The supporting specifications state that "on or after August 3, 1981"¹ appellants were sent telegrams which ordered them to report to work, but that they did not return to work and thus remained absent without authorization.

Adverse actions taken under Chapter 75 of title 5 of the United States Code must be supported by a preponderance of the evidence to be sustained. 5 U.S.C. 7701(c)(1)(B). The Board has held that this evidentiary burden of proof standard applies to "every element of proof of the agency's case." In re: William F. Van Sciver, 1 MSPB 94 (1979).

PROOF ON OCCURRENCE OF THE STRIKE

The first element of the agency's case, with respect to the first charge, is whether a strike against the United States Government occurred beginning on August 3, 1981. By order dated June 10, 1982, the Board's Chicago Regional Office took official notice that a strike by the Professional Air Traffic Controllers Organization (PATCO) and certain of its members, agents, employees and others against the United States Department of Transportation at the Federal Aviation Administration air traffic facilities under the jurisdiction of the Board's Chicago Regional Office² took place beginning on August 3, 1981. In consonance with the Board ruling in *Ketchem* (quoted in footnote 2), the Chicago Regional Office declined to take official notice of the existence of the strike beyond August 6, 1981. The taking of official notice satisfies a party's burden of proving the fact noticed, subject to refutation by the opposing party. *Ketchem*

at 3, 4; 5 C.F.R. 1201.67. I find that appellants have not, on appeal, refuted the existence of a strike for the dates August 3 through 6, 1981, and I therefore find that a strike against the United States Government by the air traffic controllers occurred at each facility in this consolidation during the period of August 3, 1981 through August 6, 1981.

Since I have not taken official notice of the existence of a strike beyond August 6, 1981, the agency is responsible for establishing, by a preponderance of the evidence, that the strike continued on and after August 7, 1981. The importance of this issue can be better understood following a brief discussion of the scheduled reporting times of controllers during the period of August-September, 1981. Documentary evidence of record reveals that on August 3, 1981, at 11:00 EDT, President Reagan advised striking air traffic controllers that they must return to work within 48 hours or they will have "forfeited their jobs and will be terminated." This Presidential statement was implemented by the Administrator of the FAA, Mr. J. Lynn Helms, in GENOTS 127 and 128, which were received by all 38 facility chiefs involved in the circumstances of this consolidation. These GENOTS (General Notices by Electronic Mail) advised facility chiefs that those controllers who failed to return to work for their first regularly-scheduled shift (referred to as their "deadline" shifts) following 11:00 EDT on August 5, 1981 should be sent proposed removal notices. Since the first scheduled shift of many of the controllers in this consolidation occurred on or after August 7, 1981, the agency must establish that a strike continued at least until the date of their deadline shifts in order to establish their participation in the strike.³

I turn now to the question of evidence which is a matter of record concerning the continuation of the strike beyond August 7, 1981. Evidence which is highly probative of a strike is the withdrawal of employee services from an employer.

The courts have, in fact, held that the "essence" of striking "is (the) actual refusal in concert with others to provide services to one's employer." *United Federation of Postal Clerks v. Blount*, 325 F. Supp. 879 (D.D.C.), aff'd 404 U.S. 802 (1971). Other evidence of the continuing strike includes the picketing activities which occurred at many of the air traffic facilities which are a part of this consolidation.⁴ Finally, I find that the public statements of the parties involved in the strike have some probative value in determining the duration of the strike.

In analyzing the above issue, it is important to keep in mind that, as stated by the Board in *Ketchem*, this strike was a nationwide strike of air traffic controllers. Therefore, even though appellant's counsel argues that the last appellant within this consolidated group could not have been "on strike by himself"⁵ since all other appellants were, by the time of his deadline shift, "locked out" of the facility and unable to report to work,⁶ this appellant was acting in concert with all other controllers on a nationwide basis, who had deadline dates on or after his scheduled return-to-duty date and who failed to return to work.⁷ I therefore find that each appellant within this consolidated group was acting in concert with other former controllers (even though those appellants with later deadline dates were arguably acting in concert with fewer striking controllers) when he failed to report for his deadline shift.

The record further shows (See footnote 4) that picketing at FAA facilities occurred well after all of the appellants in this consolidation had been charged with participating in the strike. While there is little doubt, as argued by appellants' counsel on appeal, that picketing activities are protected under the First Amendment to the Constitution (*Thornhill v. Alabama*, 310 U.S. 88 (1940)), picketing activity by controllers who were supposed to be working (the record here

is replete with such examples) may properly be considered in determining that these controllers were on strike.⁸ See *Jones v. Tennessee Valley Authority*, MSPB Docket No. AT07528010300 (February 19, 1982); *Duckett v. Tennessee Valley Authority*, MSPB Docket No. AT07528010325 (February 19, 1982). I further find, as discussed in footnote 8, that the picketing activities which occurred at some of the facilities within this consolidated group following the deadline dates for most, if not all, of the former controllers in this consolidated group provides evidence of the continuing nature of the nationwide strike.

I have also considered the public statements of the parties involved in this case in determining the length of the strike. Appellant argues that since various FAA officials declared the strike to be over on or about August 5, 1981,⁹ the strike should be considered as having ended on that date or shortly thereafter. The agency, on the other hand, introduced into the record numerous newspaper articles which quoted many of the appellants in this consolidated group as noting the continuation of the strike well beyond August 5, 1981, notwithstanding the statements of FAA officials and the position of the agency that the strike was over. In addition, the agency introduced into the record an October 8, 1981 statement from PATCO President Robert Poli, who asserted that the strike was continuing as of that date. Furthermore, the agency representative pointed out in her closing statement that the union never declared the strike to be over.

None of the statements made by any of the above-referenced individuals carry as much weight, in determining the length of the strike, as does the evidence which established the actual withdrawal of services from the agency by the controllers. Nevertheless, since union officials called the strike, I find that statements by PATCO officials as well as those made by individual controllers who are members of

this consolidated group concerning the length of the strike are more indicative of the length of the strike than are the statements of the referenced agency officials. Should the union at any time have decided to end the strike, it could have issued a public statement to that effect, and presumably those striking controllers who still could have reported for their deadline shifts would have returned to work. As aptly pointed out by the agency representative, however, the union did not declare the strike to be over, and controllers continued to absent themselves from work, in concert with other controllers, well beyond August 5, 1981. For this reason, it is clear that the strike continued well beyond August 5, 1981, and to the extent that any evidence concerning the statements of parties on the length of the strike is probative, it reveals that the strike still existed on or before the deadline dates for each of the controllers in this consolidated group.

After a consideration of all of the above factors (the nationwide scope of the strike, the continuing action of employees, in concert with others, to withdraw their services from the agency, the picketing activity, and the statements of union officials and their agents concerning the continuation of the strike), I find that a preponderance of the evidence shows that the strike continued through the time that each of the former controllers in this consolidated group was scheduled to return to work.

PROOF ON PARTICIPATION OF APPELLANTS IN THE STRIKE

I will now address the issue of the participation by the appellants in this consolidated group in the strike. Appellants' counsel and the agency entered into the following stipulation (identified as Agency Hearing Exhibit #11) which applies to all appellants at facilities other than LaCrosse (LSE),

Appleton (ATW), Pontiac (PTK) and Meigs (CGX), except as specifically noted in this decision.

Mr. (facility chief) would testify to the best of his knowledge as follows:

1. The time and attendance records truly and accurately reflect the regularly-scheduled shifts as posted on the watch schedule and any directed shift as assigned to the appellants by a supervisor and reflected in the adverse action file.
2. The appellants did not report for their first regularly-scheduled or directed shift as assigned after 11 a.m. EDT on August 5, 1981, nor any shift prior to that beginning with the 7:00 a.m. shift on August 3, 1981, (that) they were required to report for.
3. The appellants did not, in his opinion, provide any substantive information for their failure to report for the above-referenced shift.
4. Mr. (facility chief) reviewed and considered all written responses received from appellants prior to making his decision to remove appellants.
5. Mr. (facility chief) reviewed and considered all summaries and recommendations concerning the oral reply prior to making his decision.
6. All notices of intended removal were mailed regular and certified mail.
7. Mr. (facility chief) is not aware of any appellants having contacted the facility prior to their deadline shift to indicate that they were ready to work or were confused as to when to report to work.

8. In deciding that an appellant participated in a strike and was AWOL, Mr. (facility chief) considered that a nationwide strike was in progress, that the appellants were scheduled to report for work, that they failed to report to work on or at any time prior to their deadline shift and that he believed the appellants offered no substantive information for his/her absence.

For appellants at the 34 facilities covered by this stipulation (except as noted below), this stipulated testimony constitutes un rebutted evidence that these appellants failed to report for their first regularly-scheduled shifts following 11:00 a.m. EDT on August 5, 1981. The record therefore shows that these appellants withheld their services from the agency during the strike.¹⁰

The documentary evidence and the testimony of the facility chiefs for the LaCrosse (LSE), Appleton (ATW) and Pontiac (PTK) facilities establishes that all appellants at those facilities failed to report for their first regularly-scheduled shifts following 11:00 a.m. on August 5, 1981, and I therefore find that these appellants also withheld their services from the agency during the strike.

The evidence concerning the appellants at the Meigs (CGX) facility is unique in that there was no stipulated or live testimony from the facility chief because he suffers from a degenerative disease which has rendered him unable to communicate in any manner concerning these cases.¹¹ On my review of the documentary evidence contained in the appeal files for the two appellants in this consolidation from that facility, however, I find that they were scheduled for duty but did not report for their first regularly-scheduled shifts following 10:00 a.m. (CDT) on August 5, 1981. Accordingly,

the record shows that these appellants also withheld their services from the agency during the strike.

The very essence of a strike is the withholding of one's services from his employer. *The Point Reyes*, 110 F.2d 608 (5th Cir. 1940). Since a failure to appear for duty as scheduled during a strike gives added weight to the strikers' cause and since the law generally presumes that individuals intend the reasonable and probable consequences of their own actions (*United States v. Cangiano*, 491 F.2d 906 (2nd Cir.), cert. denied 419 U.S. 904 (1974)), it may be presumed that an individual who does not appear for work as scheduled during a strike supports the strike. This presumption has been recognized by the Board in the case of *Schapansky v. Department of Transportation*, MSPB Docket No. DA075281F1130 (October 28, 1982), which holds that an agency need only establish an employee's unauthorized absence from duty during a strike to establish a prima facie showing of that employee's participation in the strike. In view of the showing in this case that all appellants in this consolidated group (with the exception of those noted *infra*) withheld their services from the agency during the strike, I find that the record establishes a prima facie showing of participation in the strike by each of these former air traffic controllers.

Once a prima facie case of participation in a strike has been established, the burden of persuasion shifts to the employee to rebut the agency's case by presenting evidence to show that he had no knowledge of the strike or that his absence was due to some factor other than intentional participation in the strike. *Id.* at 6. Since no appellant in this consolidated group contends that he was unaware of the strike, I will examine the reasons given by each appellant who presented probative evidence in explanation of his non-appearance. I will also examine the defenses of those appel-

lants for whom counsel submitted specific argument at the hearing.¹²

Before proceeding with these specific cases, I will discuss an issue which appellants' counsel raises with respect to the Chicago Center (ZAU). Counsel introduced into the record (identified as Appellants' Group Exhibit #16) what purport to be the "original" sign-in logs for the ZAU facility for the first week of the strike (August 3 through 8, 1981). Appellants' counsel avers that the sign-in logs contained in the appeal files of the ZAU appellants contain certain discrepancies when compared against these original logs (such as the changing of an original notation of annual leave to AWOL) and that the agency "doctored" these amended logs in order to support the removal actions it had taken.¹³ (TR: Vol. 18, p. 114) In view of the supposed unreliability of these amended sign-in logs and the agency's purported doctoring of evidence, counsel requests that all ZAU cases be summarily reversed.

Although the agency's counsel questions in her closing argument the importance of these documents (TR: Vol. 17, pp. 43, 44), I find that they are of some significance in that ZAU facility chief George Gunter stated that he relied on the sign-in logs (the agency's time and attendance records were revived from the sign-in logs - TR: Vol. 1, p. 64) to determine whether a particular appellant appeared for duty for scheduled shifts during the strike. (TR: Vol. 1, p. 64) Since Mr. Gunter's stipulated testimony (in pertinent part, that ZAU appellants did not appear for their first scheduled shifts following 10:00 a.m. on August 5) is therefore based (for the vast majority of ZAU appellants) on this documentary evidence, rather than on any personal knowledge Mr. Gunter may have had concerning their absences, counsel's contentions concerning the validity of these documents and

his motion that all ZAU cases must be summarily reversed must be given careful consideration.

Mr. Gunter was unable to explain the "discrepancies" between these two sets of sign-in logs other than to make a vague statement that the file copy logs were "updated" (TR: Vol. 1, p. 113), and through a series of events at the hearing,¹⁴ no other evidence has been made a matter of record concerning when (if ever) the file sign-in logs were changed, who changed them, for what purpose they were changed, and which sign-in logs are more accurate. In view of the lack of evidence which would show that some of the file copy sign-in logs were "doctored" for a specific purpose, I am unable to conclude that they were altered by the agency in an improper attempt to influence the outcome of these proceedings, and I find that they cannot be totally disregarded as probative evidence. Although not necessary to this findings, I further note the inappropriateness of making a blanket finding that would, in effect, result in a summary determination that the over 100 ZAU appellants who counsel alleges have two sets of sign-in logs (or all of the ZAU appellants in this consolidated group, if appellants' argument is accepted in toto) did not miss their deadline shifts. Such a finding would be tantamount to pretending that a strike did not exist at the Chicago Center, a ridiculous finding when one considers the totality of the evidence concerning the withdrawal of services by appellants within this consolidated group, and the other strike activity at ZAU, such as picketing. I further note that my failure to exclude the agency-submitted sign-in logs did not prejudice the ZAU appellants in the presentation of their cases since these appellants could have (and many, in fact, did) dispute the fact of their alleged absences from their regularly-scheduled tours of duty or otherwise explained the reason(s) for their absences in their hearing before the Board.

Since I find that the file copy sign-in logs, upon which Mr. Gunter's testimony is in part based, cannot be summarily disregarded, I find that the agency's prima facie case, with respect to the ZAU appellants, has been properly established upon Mr. Gunter's live and stipulated testimony concerning the non-appearance of the ZAU appellants at their first regularly-scheduled shifts following 10:00 a.m. on August 5, 1981, and I see no reason to disturb my previous finding that a prima facie case of striking exists for all appellants at the Aurora facility (except as noted infra).

APPELLANTS' REBUTTAL — SPECIFIC CASES

I will now address the specific evidence and argument provided by all appellants in this consolidated case concerning their withdrawal of services from the agency during the strike.¹⁵

CHICAGO CENTER (ZAU)

TERRY ANDERSON

This appellant's proposed removal notice charges him with striking beginning with a 7:00 a.m. shift on August 3, 1981 through the date of the letter (August 5, 1981) and notes, under a second charge of AWOL, that he was scheduled for a 11:00 p.m. shift on August 5. Since the pertinent watch schedule and time and attendance report reflects that appellant was scheduled for (and missed) 3:00 p.m. shifts on August 3, 4, and 5, 1981, appellant argues that he was given improper notice of his termination and that the action should be reversed on that ground.

Appellant's motion is purely procedural in nature since the record clearly reflects that he was absent for his deadline shift as well as two previous shifts. Since the letter of intent was not issued until after this appellant had missed his dead-

line shift, the fact that the letter had the wrong times of appellant's shifts written on it had no bearing on his decision to go on strike. I further find that the error cited in this case was de minimus in nature since the letter cited the correct dates of appellant's strike activity and was sufficiently clear so to have advised appellant "with sufficient particularity...of allegations he must refute or acts he must justify." *Burkett v. United States*, 402 F.2d 1002, 1004 (Ct. Cl. 1968). I also note, in this respect, that appellant did not indicate at the oral reply that he was unable to respond to the proposal notice due to the fact that it cited the wrong shifts. I find, in short, that appellant has cited no harmful error in this respect (as required under 5 C.F.R. 1201.56 for the agency's action to be reversed on procedural grounds), and I further find that he has not rebutted the agency's prima facie case of his strike participation. I therefore find that the agency's charge is supported and sustained by a preponderance of the evidence.

RICHARD BRANDIS

This appellant testified that he was not scheduled for duty on August 3 or 4, 1981, but that he was scheduled at 7:00 a.m. on August 5 and 6 and failed to report. (TR: Vol. 7, pp. 79, 80, 87) Appellant stated, in explanation of his absences, that on August 3, 1981, he received a court summons which ordered him to appear in the Federal District Court in Chicago, and that he so appeared at 12:00 noon on August 5, 1981. He stated that the presiding judge ordered him to return to work on August 6, and that he intended to obey the judge's order until he was advised by his attorney that he had already been fired. (TR: 74-78) Appellant admitted that he did not call his facility to notify them of his court appearance, nor did he contact them to clarify his work status. (TR: 80, 85).

This case is similar to the factual circumstances of the *John Holic* (ZAU) case (discussed *infra*), with the exception that this appellant could have returned to work on August 6, 1981, the day after his court appearance. Like Mr. Holic, however, this appellant did not contact the agency to request leave time for his court appearance or to clarify his status. Moreover, the record fails to reveal that appellant made any attempt to return to work. I therefore find that he has not rebutted the agency's prima facie case, and the strike charge is supported and sustained by a preponderance of the evidence.

ALLAN BROHOLM

This appellant was charged with strike participation beginning on August 3, 1981, and the documentary evidence reflects that he was scheduled for and missed shifts on August 3-5, 1981. His deadline shift was on August 8, 1981, and his letter of intent was dated that day and charged him for his strike activity from August 3 through 8. Appellants' counsel, citing Mr. Gunter's testimony that at the time of the issuance of this appellant's proposal notice the agency had a policy of charging appellants solely for missing their deadline shifts rather than shifts missed during the 48-hour Presidential moratorium period (TR: Vol. 2, pp. 92-95), argues that this appellant was improperly charged with his strike activity on August 3-5, 1981.

A review of Mr. Gunter's testimony on this point establishes that the proposed removal notice guidelines were changed in a manner which would have resulted in this appellant only being charged with striking on August 8. Gunter did not consider this appellant's proposal notice to be in error, however, in view of his opinion that appellant could have been charged with his earlier strike participation. (TR: 93, 131) I find that even though the agency policy had

changed concerning the dates ZAU appellants were to be charged with striking, there was no prohibition against the agency making exceptions to its policy or not following its policy in all cases. I therefore find that the agency could properly have charged appellant with his strike participation for all of the days that he was on strike. Moreover, even assuming that appellant should not have been charged with his strike participation before August 8, I find that he has not rebutted the agency's prima facie case with respect to his strike participation on the 8th. In short, I find that appellant has not rebutted the agency's prima facie case, and the strike charge is supported and sustained by a preponderance of the evidence.

JAMES BURGARD

This appellant was scheduled for duty on August 3 through 5, 1981, but failed to report as scheduled. He did not testify at the hearing, but his wife testified on his behalf. She stated that he worked on August 2, but began complaining of "back-ache and stomach pains" on August 3 and stayed in bed that day. (TR: Vol. 6, p. 93) On August 4, she called a doctor who set up an appointment for appellant on August 10. By August 7, she testified that appellant was in "excruciating pain" and went to the emergency room of a hospital, where his condition was diagnosed as kidney stones. She further stated that surgery was necessary to correct his ailment. (TR: 94-97) Mrs. Burgard admitted that neither she nor her husband contacted the facility to request sick leave for the period of his absence. She stated, in explanation, that her husband was "under the impression" that sick leave was being refused. (TR: 93, 94)

Although the testimony of Mrs. Burgard would indicate that her husband was in some pain during the first week of the strike (this testimony is corroborated by some medical

documents which were introduced by appellant on appeal), appellant never went through proper channels to request sick leave for his absence. Had appellant made such a request, his condition could have been evaluated by appropriate agency personnel and a determination could have been made concerning his ability to work. Appellant's failure to contact the agency casts doubt on the legitimacy of the reasons for the absence and left the agency with no alternative but to consider him on strike. I therefore find that appellant has not rebutted the agency's prima facie case of his strike participation, and that the strike charge is supported and sustained by a preponderance of the evidence.

ROBERT A. CARLSON

This appellant was initially issued a proposed removal notice on August 11, 1981 for his alleged strike activity beginning at 11:00 p.m. on August 3, 1981 "until the present." Following appellant's oral reply to this proposal notice, the agency amended its charge to allege that appellant was on strike beginning at 3:00 p.m. on August 6, 1981. Mr. Gunter admitted on appeal that this appellant had no shift on August 3 (after 7:00 a.m.), that the 4th and 5th were his regular days off, and that the 6th of August at 3:00 p.m. was actually his first shift during the strike as well as his deadline shift. (TR: Vol. 2, pp. 120, 121) Appellant argues on appeal that his remarks at the oral reply were subsequently "used against him" (TR: Vol. 18, p. 161), and that the agency could not subsequently correct its charge after his oral reply.

Before addressing the above procedural issue, I note that the documentary evidence establishes appellant's failure to appear at work for his deadline shift. Appellant has presented no reason for his failure to appear at that shift, and I therefore find that he has not rebutted the agency's prima facie case of his strike participation on that date. According-

ly, the strike charge is supported and sustained by a preponderance of the evidence.

Concerning appellant's allegation of procedural error, he has the burden of establishing, by a preponderance of the evidence, that this purported error was "harmful" (that the agency might have reached a different conclusion in the case in the absence of the error). *See Jones v. Department of the Navy*, MSPB Docket No. PH07528010141 (July 30, 1981); 5 C.F.R. 1201.56(b)(1). Appellant has not cited, and I do not find, that there is any law, rule, or regulation which precluded the agency from cancelling its first letter of intent, and issuing another one, following appellant's oral response. I further find that appellant has failed to show the harm of the agency's action in view of the fact that the first letter charged him with strike participation from August 3-11 (a period of time which encompassed his August 6 deadline date). In short, I find that appellant has not met his burden of showing harmful error concerning this allegation.

LARRY EDEN

This appellant was charged for his strike activity beginning with the 11:00 p.m. shift on August 6, 1981 through the date of the proposal notice, August 8, 1981. The documentary evidence of record reflects that appellant was scheduled for, missed, and was recorded as AWOL for the 11:00 p.m. shift on August 5 and the 7:00 a.m. shift on August 8. Gunter admitted that the proposal notice incorrectly charged appellant with missing the 11:00 p.m. shift on August 6. (TR: Vol. 3, pp. 52, 53)

Since appellant has not been charged with his strike participation for his failure to appear for his August 5 shift, I will not consider his absence on that date as a part of the charge against him. Appellant's failure to appear for the August 5 shift, however, meant that he had missed his deadline shift,

that he was "locked out" of the facility (TR: Vol. 2, pp. 26, 27), and that he would have been unable to work the August 8 shift. (TR: Vol. 2, p. 27) I therefore find that he cannot be charged with his withholding of services on August 8, in view of the fact that he would not have been permitted to return to work (See Hess (ZAU) case, discussed *infra*).¹⁶ In short, I find that the agency has not established a prima facie case of this employee's strike participation, and the charge must be dismissed.

JEFFRY ELLIS

This appellant was charged with strike participation beginning at 7:00 a.m. on August 3, 1981 through the date of the notice (August 5, 1981), and the second charge (AWOL) notes that he was scheduled for a shift to begin at 11:00 p.m. on August 5, 1981. The documentary evidence reveals that appellant was scheduled for, missed, and was recorded as AWOL for the 7:00 shifts on August 3 and 4, an 11:00 p.m. shift on August 4, and a 7:00 a.m. shift on August 6, 1981 (his deadline shift). Mr. Gunter admitted that the agency had incorrectly charged appellant in the proposal notice, and that the charges were issued before appellant's deadline shift. (TR: Vol. 3, pp. 51, 52)

Although the record would indicate that appellant was "locked out" of the facility (See TR: Vol. 3, p. 30) and would not have been able to work on August 6 had he reported for duty, I find that there is an important distinction between this case and the cases of other appellants where I have not sustained the charge based on this "lock-out" situation. Specifically, this appellant was properly charged with and I now find that he was on strike for three shifts before his deadline shift. Since implicit in the concept of a "deadline shift" is the requirement that an appellant must report back to work before he can gain amnesty for his past strike activities, I find that

the agency could have properly charged this appellant with his strike activities on August 3 and 4 since this appellant never reported back to work (even assuming that he would not have been permitted to work his position). I further note that this appellant did not receive his proposed removal notice prior to his deadline shift and therefore could not have relied on the notice in failing to report to work. I find, — in short, that appellant has not rebutted the agency's prima facie case, and that the strike charge for his August 3 and 4 shifts is supported and sustained by a preponderance of the evidence.

JORDAN HESS

This appellant was on uncanceled annual leave during the first week of the strike and was due back to work on August 10, 1981 at 3:00 p.m. In a letter dated August 8, 1981, the agency erroneously proposed his removal for his failure to report to work during the period of his annual leave. Appellant failed to report for his shift on August 10, and the agency cancelled its prior proposed action and issued a new proposal notice on September 9, 1981 for appellant's failure to report for work on August 10. Appellant contends that he received, via regular mail, a copy of his proposal notice on August 10, before his scheduled shift, and that he did not report for duty or call the facility because "the proposed notice said (he) was already fired about five days prior to that." (TR: Vol. 6, pp. 133, 136) Appellant stated that he checked with PATCO "to see what was going on with these kinds of things" (TR: 137), that he appeared on the picket line on numerous occasions on or after August 11, and that he supported the actions of other picketers, including those who were (in the words of the agency representative) "yelling and shouting." (TR: 141-144) Chief Gunter admitted that since appellant had been issued a proposed removal notice before his assigned shift on August 10, he "would not have

been permitted to work his position." (TR: Vol. 3, p. 30) Gunter stated, however, that appellant was "observed" in the area, did not attempt to contact the facility (either by telephone or in person) to clarify his situation, did not attempt to report to duty on August 10, and did not explain his circumstances at the oral reply. (TR: 26, 27, 29, 35)

The above evidence raises some question about whether appellant intended to report to work on August 10, in view of his failure to call the facility or attempt to report to work (there is no evidence that appellant was aware that he would be unable to report to work). Nevertheless, I find that the appropriate test for evaluating appellant's strike participation must be based on a determination of whether appellant was scheduled for and would have been permitted to work for the time he was charged with being on strike. Stated another way, I find that an appellant cannot be charged with withholding his services from the agency (the "essence" of striking as noted previously) on a day when he would not have been permitted to work.¹⁷ For this reason, I find that evidence of an appellant's subjective intent (including his picketing activities) are not relevant in a case such as this where the undisputed record reveals that appellant could not have withheld his services since he would not have been permitted to work. I find, in short, that the agency has not established a prima facie case of the participation by this appellant in the strike, and that the strike charge is not sustained.

JOHN HOLIC

This appellant was scheduled for duty at 3:00 p.m. on August 3 and 5, 1981, but failed to report for either day. He candidly admitted that he was "on strike" on August 3 (TR: Vol. 5, p. 58), but offered as a reason for his absence on August 5 the fact that he was summoned, as a local PATCO officer, to appear in the Federal District Court for the Nor-

thern District of Illinois for the purpose of compelling him to return to work. (TR: 47-49) He stated that while he was in court, his attorney advised him that he had already been fired and that he could not return to work. (TR: 61) Appellant further stated that he had "assumed" the agency knew he would be in court on August 5, and he admitted his failure to contact the agency and notify them of his absence that day. (TR: 59, 60)

Appellant Holic has admitted he participated in the strike on August 3. As for his absence on August 5, I do not find his explanation persuasive. He had the responsibility for notifying the agency of his absence and for requesting court leave to cover the period of his absence. Notwithstanding this obligation, appellant did not report his absence to the agency, nor did he take any other steps to return to work. I find, in short, that appellant has not rebutted the agency's prima facie case of his strike participation, and the strike charge is therefore supported and sustained by a preponderance of the evidence.

JEROME IWANSKY

This appellant was on annual leave for the period of the first week of the strike, and he was fired for his participation in the strike that week. Appellant's appeal file reflects that his supervisors made numerous telephone calls to his house in an attempt to cancel his leave (as documented in written memorandums), but they were unsuccessful in reaching him. Appellant's wife was reached during these attempts and was told to have appellant call the facility. Appellant, however, never returned the facility's calls. In one of the referenced memorandums, appellant's team supervisor, Mr. Wayne Winslow, stated that "due to the discussions on a daily basis," appellant Iwansky was aware that his annual leave was cancelled in the event of a strike. Mr. Gunter stated that he

relied on these memorandums in determining that appellant should be terminated since, in his opinion, appellant Iwansky knew that his leave was cancelled in the event of a strike. (TR: Vol. 6, pp. 46, 55)

The failure of appellant to return the facility's calls and the statement of his team supervisor that he (appellant) was aware that his leave was cancelled in the event of a strike strongly suggests that appellant willingly intended to participate in the strike. Notwithstanding this possibility, however, I find that appellant's leave was never specifically cancelled, and I am unwilling to read into the record, from inferences that might be drawn from the above evidence, a contrary finding. I note parenthetically that in view of the agency's failure to cancel appellant's leave, it should have merely waited for the end of his leave and see if he returned to duty. It did not, however, and since appellant could not have withheld his services during a period in which he was on uncanceled annual leave, I find that the agency has not established a prima facie case of his strike participation. Accordingly, I find that the strike charge is not sustained.

JEAN KEMPHUES

This appellant was issued a proposed removal notice, dated August 8, 1981, which charged her with striking starting with her 11:00 p.m. shift on August 5, 1981 "until the present...." Mr. Gunter testified that appellant's first scheduled shift during the week of the strike was on August 8, 1981 at 7:00 a.m. (TR: Vol. 3, pp. 54-56) The file copy sign-in log and watch schedule reveal that appellant's first scheduled tour of duty during the strike (and also her deadline shift) was the 7:00 a.m. shift on August 8, 1981, but that appellant did not appear for that shift. Appellants' counsel argues that appellant was fired, at least in part, for shifts she was not required to attend (due to annual leave), and he also

argues that her sign-in log (for August 5) was improperly altered. In support of the latter argument, he introduced into the record (as Appellant's EXhibit #15) a copy of a sign-in log for August 5, which is different from the one in the record and shows that appellant was on annual leave on that date.

I find that appellant's arguments concerning the sign-in log for August 5 are of not material since the agency, via Mr. Gunter's testimony, has, in effect, stipulated that appellant was on annual leave on August 5. The key issue is whether the strike charges must fail due to the agency's error in charging appellant with striking on days when she was on annual leave. Insofar as the charge is based on those days, it cannot be sustained. As far as appellant's absence on August 8, which is not disputed in the record, the charge does state a proper cause of action. Since appellant was not "locked out" of the facility at that point but failed to return to duty, I find that this portion of the charge, for which the agency has established a prima facie case, has not been rebutted by appellant. I therefore find that the strike charge is supported and sustained by a preponderance of the evidence.

DAVID KISH

This appellant was issued two proposed removal notices. The first one, dated August 10, 1981, charges him with strike participation from 8:00 a.m. on August 5, 1981 to August 10, and the second one, dated September 4, 1981, charges him with strike participation beginning at 7:30 a.m. on August 6, 1981 until the date of the notice. Mr. Gunter testified that this appellant should have been charged, in the first proposed notice, with missing his deadline shift, which was (as referenced in the second proposal notice) on August 6 at 7:30 a.m. (the record shows that appellant was scheduled at 7:30 a.m. on August 5, rather than at 8:00 a.m.). (TR: Vol. 2, pp. 146, 147; File: Tab 5) The record reflects that appellant

did not report for either the August 5 or the August 6 shift, and that he was recorded as AWOL. Appellant's representative argues that once appellant was fired for missing the August 5 shift, he had no obligation to return to work on August 6.

This appellant was not locked out of the facility on August 6, since he had not missed his deadline shift before that date, nor had his first proposed removal notice been issued. Appellant could have therefore worked his deadline shift, but the record reflects that he did not appear for it. I therefore find that he was properly charged with missing the August 6 shift, and that he has not rebutted the agency's prima facie case of his strike participation. I therefore find that the strike charge is supported and sustained by a preponderance of the evidence.

DENNIS LOGERQUIST

Appellant Logerquist was charged with striking beginning with his 7:30 a.m. shift on August 3, 1981 through the date of the proposal notice (August 6, 1981). The documentary evidence submitted by the agency reflects that appellant was scheduled for duty on August 4-6, 1981 (for shifts beginning at 6:30 a.m.), and that he missed those shifts and was charged with AWOL. Appellant argues (based on the testimony of Mr. Joseph Quartuccio, data systems specialist, who stated that he was unfamiliar with the watch schedule in appellant's file - TR: Vol. 4, pp. 78-81), that the agency's documentary evidence should be disregarded.

Although some of the documentation in this appellant's file has been called into question by Mr. Quartuccio, there is an absence of evidence which would indicate that these documents are invalid or incorrect, and I am unable to find, as counsel argues, that they should be totally disregarded. Moreover, I note that Mr. Quartuccio himself testified to

appellant's absence from his scheduled tours of duty during the first week of the strike. (TR: 60, 78, 79) Appellant has failed to provide any evidence concerning his absence from duty during the strike, and I therefore find that he has not rebutted the agency's prima facie case of his strike participation. Accordingly, I find that the strike charge is supported and sustained by a preponderance of the evidence.

PATRICK LYDON

This appellant stated that on July 31, 1981, his wife gave birth to a premature baby weighing 1 pound and 14 ounces, and that he called his supervisor and requested annual leave. He stated that when he informed his supervisor that he would call in Monday (his next assigned workday) if he was unable to return to work, his supervisor replied "Don't worry about it....Come back when you can." (TR: Vol. 7, pp. 135, 139, 140) Appellant stated that based on this conversation he believed that the agency had granted him indefinite emergency annual leave and that it should have called him if it needed his services. (TR: 146) The record shows that appellant missed all of his scheduled shifts during the week of the strike, including his deadline shift on August 6, 1981. The time records in this appellant's file reflect that he was only granted annual leave for the day of July 31, 1981.

The record in this case reveals that appellant was undergoing a personal emergency situation which, according to his testimony, existed for at least the first week of the strike. Notwithstanding this emergency, he was still required to secure approved leave for the period of his absence. Even assuming the accuracy of appellant's account of the telephone conversation with his supervisor, he was not specifically advised that he would be granted indefinite emergency annual leave. Moreover, there is no written record that he was put in such a leave status. Appellant was responsible for specifically

securing leave for the period of this absence, and I find that the record fails to indicate that leave was granted in this case. In making this finding, I note that it was unreasonable for appellant to have expected the agency to call him. The agency was itself in an emergency situation, and it could not have been expected to call employees to discuss personal situations such as that which existed here. Furthermore, appellant could have himself clarified his leave situation if he had so desired since he had enough time to go to the union headquarters to show pictures of his baby to some friends (TR: Vol. 7, p. 150) and to stand on the picket line shortly following his deadline date. (TR: Vol. 4, p. 66) I find, in short, that this appellant has not shown the legitimacy of his absence during the week of the strike, and that he has failed to rebut the agency's prima facie case against him. I therefore find that the strike charge is supported and sustained by a preponderance of the evidence.

ROBERT H. MILLER

This appellant was on uncanceled annual leave during the entire time he was charged with striking. On August 14, 1981, his attorney called the facility and advised Mr. Richard Pender that Mr. Miller was "ready and willing" to return to work on August 17 when his vacation was over, but Mr. Pender advised him that Miller could not return to work at that time. (File: Tab 2) Mr. Gunter candidly admitted that he made a mistake in this case. (TR: Vol. 6, p. 31)

I find that the agency has failed to establish that this appellant withdrew his services during the strike, and that it has not established a prima facie case of his strike participation. Accordingly, I find that the strike charge cannot be sustained.

HENRY MOSES

This appellant testified that he was scheduled to work on August 6 at 3:00 p.m., but that he was experiencing a shortness of breath and stayed home on his doctor's advise. (TR: Vol. 6, pp. 150, 151) He further noted that the doctor had prescribed a medicine which made him drowsy. (TR: 152) Appellant stated that he called into the facility at 2:00 p.m. on August 6 and requested "indefinite sick leave," but that some unidentified person advised him that all sick and annual leave had been "cancelled". (TR: 154) In support of his appeal, appellant introduced into the record a statement dated August 31, 1982 from Dr. Osvaldo Lastres, who described appellant's condition (on or about August 6, 1981) as a "general malaise."

Assuming that appellant had, in fact, called into the facility on August 6 to request sick leave (a tenuous assumption in view of appellant's failure to talk to his supervisor or anyone else whose name he could recall), the reply made by the unidentified individual he talked to was (apparently) that his leave request could not be approved. The approval of leave is at the discretion of appropriate supervisory authority, and I find, in view of the emergency circumstances which existed at the facility and the medical condition which is now described by appellant's doctor, that it was not unreasonable for the agency to have denied any sick leave request made by appellant. I note, in making this finding, that even assuming appellant was on medication which made him drowsy, he still could have performed administrative (not air controlling) work. In short, I find that appellant has not rebutted the agency's prima facie case, and that the strike charge is supported and sustained by a preponderance of the evidence.

JAMES H. PEACOCK, JR.

This appellant received two letters of proposed removal. The first one, dated August '10, 1981, charged him with his

alleged strike activity beginning at 11:00 p.m. on August 3, 1981 "until the present...." Following appellant's oral reply to this letter, the agency cancelled the first proposal notice and issued a second one, dated September 10, 1981, which charges appellant with his purported strike participation beginning at 3:00 p.m. on August 6, 1981. Counsel argues that the agency improperly considered appellant's statements in his response to the first proposed removal notice and that it should not have (apparently) issued the second proposed removal notice.

The documentary evidence of record reveals that this appellant missed his deadline shift on August 6, 1981, and I find, based on reasoning identical to that discussed above in the *Carlson* (ZAU) case, that the charge is sustained and that there is no harmful error.

L. RODNEY PETERSON

This appellant was scheduled for duty on August 3 and 4, but did not report on those days. Beginning on August 5, 1981, he was scheduled for annual leave which was to last until a return date of August 21, 1981. He was fired for missing work between the dates of August 6 and 8, 1981. The documentary evidence shows and Mr. Gunter admitted on appeal that he was on uncanceled annual leave during this period of time. (TR: Vol. 1, pp. 106, 107) Mr. Gunter stated in explanation that had appellant shown up for work on August 3 or 4, his leave would have been cancelled. (TR: Vol. 1, pp. 104, 105) Mr. Felton Mitchell, appellant's team supervisor, also testified in support of the agency's action. He stated that appellant was aware that in the event of a job action his leave would be cancelled, and that appellant advised him on some unspecified date in July, 1981 that "I'll be damned if I come in and I'm on leave." (TR: Vol. 6, pp. 5, 6)

Mitchell admitted that he did not specifically discuss with appellant the leave which is at issue in this appeal. (TR: 4)

Once again, inferences can be drawn from the above evidence concerning appellant's willingness to work during the strike. Nevertheless, I find the record to be clear in showing that appellant was on uncanceled annual leave for the period for which he is charged with striking. I therefore find that the agency has not established a prima facie case of this former controller's participation in the strike, and the strike charge is not sustained.

PETER PIORKOWSKI

This appellant testified that he was scheduled for duty at 11:00 p.m. on August 3 and at 3:00 p.m. on August 7, 1981, but that he missed both of these shifts. He offered as the reason for his absence the fact that his wife was five and one-half months pregnant and was "undergoing quite a bit of difficulty with premature labor..." (TR: Vol. 7, p. 118) In addition to the difficulties caused by his wife's condition, appellant stated that he had a four-month old child who required "quite a bit of work." (TR: 118) Appellant claims to have missed his shift on August 3 because "I wasn't aware that I was to report," and he claims to have intended to report on August 7 but that he was unable to report on time due to late arrival at his house of a baby-sitter. (TR: 110, 123) He stated that he picketed "quite regularly" after he "learned that he had been fired" and that he went to the union headquarters "quite often to find out any current information." (TR: 119, 120)

Appellant's claim that he was unaware of his shift on August 3 must be evaluated in light of the agency's policy that all shifts were posted at least 3 weeks in advance. (TR: Vol. 1, p. 71) Since appellant was responsible for knowing his shift and since he admitted that in eleven previous years

he "may" have only missed one previous shift (TR: 123), I find appellant's excuse for missing this shift to be not credible. With respect to appellant's absence on August 7, he was responsible for being at work and for hiring whatever domestic help was necessary to enable him to fulfill that responsibility. Accordingly, I do not find appellant's excuse of a late baby-sitter to be persuasive. When he did not show up for his shift, the agency properly considered him to be on strike. Appellant's apparent plea of a lack of time to report to work is dubious in view of his admission that he had enough time to regularly picket and visit the union headquarters. I find, in short, that appellant has not rebutted the agency's prima facie case, and the agency's strike charge is supported and sustained by a preponderance of the evidence.

KENNETH POPOWITCH

The documentary evidence reflects that this appellant was assigned to a 3:00 p.m. shift on August 3, a 7:00 a.m. shift on August 4, and an 11:00 p.m. shift on August 4. He was then not scheduled until August 8 at 4:00 p.m. By letter dated August 5, 1981, appellant was advised of his proposed termination for his absences from August 3 through August 5 (the record reflects that appellant received a copy of this notice on August 8). His representative argues on appeal that he was improperly fired before his deadline shift.

The material facts of this case (insofar as they relate to the strike charge) are the same as those described in the *Ellis* (ZAU) case, with the exception that this appellant (apparently) received his proposed removal notice prior to the start of his deadline shift (i.e., the documentary evidence reveals that appellant was scheduled for and missed three pre-deadline shifts during the strike, and fails to indicate any attempt by appellant to return to work for his deadline shift).

Notwithstanding appellant's apparent receipt of the proposed termination notice prior to his shift, I find that the bottom-line conclusion in this case must be the same as that stated in *Ellis*. The reason for this finding is that appellant has made no showing that he relied on his receipt of the proposed removal notice in not reporting to work, or that he was aware at the time he received it that he was "locked out." He should have therefore reported to work (See *Ellis*) for his deadline shift to claim amnesty for his prior strike participation. I find, in short, that this appellant has not established a rebuttal defense to the agency's prima facie case of his strike participation, and that the strike charge is supported and sustained by a preponderance of the evidence.

WAYNE PRICE

This appellant stated that his wife was in her seventh or eighth month of pregnancy during the first week of the strike. He stated that he had to care for his wife in July of 1981, and that on August 1, 1981, he went to see a clinical psychologist because he was "feeling rotten." (TR: Vol. 6, pp. 108-110) The psychologist (in a statement dated September 2, 1982) stated that he diagnosed appellant's condition as "acute anxiety depressive reaction" and recommended that appellant take two weeks off from work. Appellant testified that he then called the facility (apparently on August 1) and advised Mr. Robert Bachman that he was requesting indefinite sick leave. Mr. Bachman, according to appellant, replied "I have your request." (TR: 112) Based on this purported telephone conversation, appellant "believed" he was on sick leave, and he did not report for any of his assigned shifts during the strike. (TR: 113, 118) Appellant Price admitted on cross-examination that Mr. Bachman was not his supervisor, and that he did not attempt to contact his own supervisor to either request leave or to confirm his leave status. (TR: 116, 120)

This appellant made an assumption, based on an ambiguous telephone conversation with an individual who was not his supervisor, that he had been granted indefinite sick leave. This was, given these factual circumstances, a clearly inappropriate assumption. Appellant was responsible during this period, no less than any other period, for specifically obtaining sick leave. Such specific approval was particularly necessary here in view of the length of the leave request and the emergency situation which confronted the agency. I find, in short, that appellant has not rebutted the agency's prima facie case, and that the strike charge is supported and sustained by a preponderance of the evidence.

RUDOLPH RADNOFF

This appellant was fired for his strike activity from August 3 through 10, 1981. He was scheduled for duty on August 3-5, 1981, but did not report to work and was charged with AWOL for those days. He then had a combination of regular days off (RDOs) and annual leave which permitted him to return to work on August 14, 1981 (his deadline date). (TR: Vol. 6, p. 59) The only evidence of record which would indicate that this leave was cancelled are the sign-in logs which are contained in appellant's appeal file. (TR: Vol. 6, p. 61) These logs have lines drawn through annual leave notations, and, in some sections, have supplemental notations of "AWOL." The sign-in logs made a matter of record by appellant (Appellant's Hearing Exhibit #16) reflect that appellant was on uncanceled annual leave for the day of August 8, 1981, and the file copy watch schedule reflects that appellant was on annual leave following August 5, 1981. The record reflects no attempt by appellant to report to work for his August 14 deadline shift, and he was recorded as AWOL on that date.

There is some uncertainty in the record concerning whether this appellant's annual leave was cancelled during a period from August 6 through 13, 1981. In view of the lack of clarity of this evidence, I find that the agency has not shown, by a preponderance of the evidence, the cancellation of this leave. The record does reflect, however, that appellant did not work during three work shifts during the strike, and that he (apparently) made no attempt to return to work on August 14, 1981 to claim amnesty for his strike participation. I therefore adopt the analysis stated in the *Popowitch* (ZAU) case and find that the strike charge against this appellant must be sustained.

LELAND RASMUSSEN

This appellant was scheduled to return to duty, following his regular day off, on August 6, 1981 at 3:00 p.m. He stated that he had heard about President Reagan's statement that controllers had until 11:00 EDT on August 5, 1981 to report to work, but that he "couldn't believe it (the deadline) appl(ied) to (him) since (he) was not supposed to be there." (TR: Vol. 7, pp. 90-92) He further stated that a supervisor at the facility by the name of Tony Cimino advised him that "somebody is going to call you." (TR: 91) He stated that he waited at his house for a call, but when no one called, he called the facility (at about 2:00 p.m. on August 6). (TR: 94) When this call failed to put him in contact with his supervisor, he stated that he drove to work, where he was allegedly advised, by some unidentified individual at PATCO union headquarters, that no one was reporting for their shifts. He stated that he then believed that there had been a "screw up," and he returned home. (TR: 94)

Although this appellant's testimony would indicate his confusion about whether he could report to work, he did not exercise due diligence in attempting to contact the facility to

clarify his situation. For most of the period prior to his shift, he merely waited for the facility to call him, a clearly unreasonable expectation in view of the facility's workload and the fact that he himself should have exercised enough initiative to find out his own schedule. He then made only a prefatory attempt to call his supervisor an hour before his scheduled shift, and readily accepted the apparent advice of PATCO that since others were not reporting to work neither should he. I find, in short that this appellant has not rebutted the agency's prima facie case of striking, and that the strike charge is supported and sustained by a preponderance of the evidence.

MICHAEL REEDY

This appellant had scheduled shifts on August 3 and 4 which he did not attend and for which he was recorded as AWOL. His next scheduled shift, which was his deadline shift, was on August 7 at 7:00 a.m. The proposed removal notice in his case was issued on August 5, 1981, and it charged appellant with his strike activity beginning August 3 through the date of the notice. The AWOL charge cited appellant for missing an 11:00 p.m. shift on August 5 which he was not scheduled for. (TR: Vol. 3, pp. 79, 80) Appellant argues that he should not be removed since he was "locked out" of the facility prior to his deadline shift. A review of appellant's petition of appeal and the certified copy of his return receipt reflect that he received his copy of the proposed removal notice after his deadline date. The record further reflects that this appellant failed to report (or that he made any attempt to report) for his deadline shift.

The factual circumstances of this case are identical in all significant respects to the circumstances described in the *Jeffrey Ellis* (ZAU) case. I hereby adopt the analysis used in that

case and find that the strike charge against this appellant is sustained.

STANLEY RUDD

The appellant was scheduled for duty on August 3-6, 1981, but did not report to work on any of those days. He stated that although he worked on August 1, 1981, he began to experience back pains, which he stated "incapacitated" him from duty beginning on August 3, 1981. (TR: Vol. 6, pp. 172-175) He stated that the only day he called the facility was on August 4, 1981, and that (although he did not request sick leave) he was advised that sick leave requests were not being approved. (TR: 176, 177, 186, 194) Appellant Rudd introduced into the record a doctor's statement dated October 6, 1982, which stated that he had visited the doctor's office during the first week of the strike and had complained of low back pain.

As in the *Burgard* (ZAU) case, this appellant failed to request sick leave for his condition. In addition he was observed by two witnesses (Joe Quartuccio and Richard Hansen) to be on the picket line on August 3 and/or 4, 1981. (TR: Vol. 4, pp. 82, 148) Although appellant denied being on the picket line prior to August 8, I find the testimony of witnesses Quartuccio and Hansen to be credible and conclude that appellant was well enough on August 3, 1981 to walk the picket line. It is therefore reasonable to conclude that he was also well enough to work during the first week of the strike. I find, in short, that appellant Rudd has not rebutted the agency's prima facie case against him, and that the strike charge is supported and sustained by a preponderance of the evidence.

DON SCHUEMANN

This appellant did not appear for three shifts which had been scheduled during the period of August 3-5, 1981. He had uncanceled annual leave for August 6, 1981, and the record reveals that his deadline shift was at 4:00 p.m. on August 8. His proposal notice was dated on August 5, 1981 and was (according to appellant's petition of appeal) most probably received by him prior to his deadline shift. Mr. Gunter testified that this appellant was properly fired because of his strike participation on August 3-5, 1981. He also commented that appellant should have been at work on August 6 because all controllers at the facility were aware, or should have been aware, that all annual leave was cancelled in the event of a strike. (TR: Vol. 2, pp. 98-100, 107)

I do not find Mr. Gunter's argument about the general awareness of the cancellation of annual leave to be persuasive since the degree of knowledge this appellant and various other appellants in this consolidated group had of the policy is not clear from the record. In any event, this appellant was not charged for his activity on August 6. He was charged for three other shifts which occurred prior to his deadline shift. The material factual circumstances of this case are identical to those of the *Popowitch* (ZAU) case, and I hereby adopt the analysis stated in that case and find that the strike charge against this appellant must be sustained.

WILLIAM SIERGEY

This appellant was on uncanceled annual leave and was due back at work at 1:00 p.m. on August 11, 1981. (TR: Vol. 3, pp. 39, 40) By letter dated August 10, 1981, he was charged with striking between the period of August 6 through August 10, 1981. This letter was received by appellant on either August 12 (according to appellant's petition of appeal) or August 13 (as the certified mailing receipt would indicate). By a second proposal notice (dated September 16, 1981), the

first proposal notice was withdrawn, and appellant was charged with missing his actual deadline shift of 1:00 p.m. on August 11, 1981. Mr. Gunter admitted that appellant would not have been permitted to work the August 11 shift because at that point "he would have had to go through the oral reply." (TR: 47)

In this case appellant did not report for duty on August 11, 1981 even though he had not received his proposed removal notice and presumably did not know he was "locked out" of the facility. For this reason, a very strong inference exists that he fully intended to participate in the strike. Despite this intent, however, the relevant issue is whether this appellant could have participated in the strike in view of the fact that he could not have worked his position. In answer to this question, I must once again find, notwithstanding appellant's apparent strike intent, that he simply could not have withheld his services "in concert with others" when his services would not have been accepted by the agency. See *Ketchem* (November 23, 1982). I therefore find that the agency has not established a prima facie case of this former controller's participation in the strike, and that the strike charge is not sustained.

EDWARD STEVENS

The factual circumstances of this case are similar to those of the *Hess* (ZAU) case. Appellant was issued a proposed removal notice, dated August 8, 1981, which charged him with striking for a period of time that he was on annual leave. On September 9, 1981, he was issued another proposed removal notice, which cancelled the first notice and charged him with being on strike beginning on August 19 (the day he was scheduled to return to the facility following his annual leave). Although Mr. Gunter admitted that this appellant would not have been permitted to return to work on August

19, he stated that appellant should have communicated his situation to the facility or at least made an effort to return for his August 19 shift. (TR: Vol. 6, p. 20) the record reveals significant picketing activity by Mr. Stevens. (TR: Vol. 4, pp. 128, 129, 145-147; Vol. 5, p. 17)

In view of appellant's picketing activities and his failure to attempt to report for work (once again, there is no evidence that he knew that he would be unable to work after his annual leave expired), there is considerable doubt whether this appellant ever intended to report to work on August 19, 1981 per his original schedule. Nevertheless, under the objective test noted above (i.e., could he have reported), I find that he was unable to withhold his services since they would not have been accepted. I therefore find that the agency has failed to establish a prima facie case of this appellant's strike participation, and the strike charge cannot be sustained.

HOWARD TAGGART

This appellant was fired for his alleged strike participation beginning with the 2:00 p.m. shift on August 3, 1981 through August 6, 1981. The documentary evidence reflects that appellant was scheduled for and missed four shifts during the period of the strike cited in his charge. Appellant submitted no evidence on appeal but argues, for the same reasons noted in the *Logerquist* (ZAU) case, that the documentary evidence in his file is unreliable and should be disregarded.

The available documentary evidence in this case clearly shows appellant's absence during the strike as charged, and I find, for the same reasons cited in the *Logerquist* case, that these documents cannot be disregarded. (I note that this appellant does not contend that they are inaccurate.) I find, in view of appellant's failure to rebut the agency's prima facie case of his strike participation, that the strike charge is supported and sustained by a preponderance of the evidence.

THOMAS TOEPFER

This appellant was fired for failing to report for work at a 7:00 a.m. shift on September 7, 1981. Appellant testified that he had an operation for a prostate problem on July 20, 1981, and that his doctor advised him that he could return to work on September 7, 1981. (TR: Vol. 6, pp. 199, 200, 206) Shortly before September 7, he went into the facility, discussed with Mr. Douglas French, facility deputy chief, his work schedule, and agreed to resume work on September 7. (TR: 209) Appellant testified that on September 7, 1981 he went to work, but that he stopped to talk with some picketers before he entered the facility. He stated that he then began to feel sick and that he left the picket line to go home. (TR: 210, 211) He stated that he also failed to go into work on his scheduled date of September 8. (TR: 212) Appellant testified that he did not call the facility on either September 7 or 8 to advise them of the reasons for his absences since the agency was aware of his sick record and should have concluded that he was "on approved sick leave" for September 7 and 8. (TR: 213, 215, 223)

The only medical documentation in this case which is a matter of record (an August 25, 1981 statement from appellant's physician) indicates appellant's ability to return to work on September 7, 1981. Appellant was specifically scheduled to begin work that day, and he did not request, nor did he receive, sick leave for his absences on September 7 and 8. Finally, appellant did not attempt to meet with his supervisors on September 7, even though he was, by his own admission, right outside the facility gate on that day, nor did he later call them on either of the days of his absence. I find, in short, that this appellant has not rebutted the agency's prima facie case of his strike participation. I therefore find that the strike charge is supported and sustained by a preponderance of the evidence.

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GLENN YOUNG

This appellant stated that he missed his regularly-scheduled tour of duty (at 1:00 p.m. - not 3:00 p.m. as stated in the proposed removal notice - on August 6, 1981) because his supervisor, Mr. Robert Bachman, had placed him on indefinite administrative leave. He stated, in explanation, that at about 6:30 a.m. on August 3, 1981 (following the completion of his night shift), he had a confrontation with Mr. Bachman over the sign-in records of another employee. Appellant stated that Bachman "started to get very agitated" and that he (appellant) grabbed him, at which point Bachman ordered him off the platform and told him "not to return until he let me know when." (TR: Vol. 7, pp. 12-14) Appellant stated that he then left the facility and immediately began picketing. (TR: 20) Appellant admitted that Mr. Bachman never specifically stated that he was placing him on administrative leave. (TR: 27) Bachman responded in rebuttal that appellant "lost control of his emotions" on the date and time in question, and that he ordered appellant to go home for the day (approximately one-half hour before his regular check-out time). Bachman responded "absolutely not" when asked if he had granted appellant administrative leave. (TR: Vol. 7, pp. 159, 160, 163, 164)

After careful consideration of the testimony of Mr. Bachman and appellant, I find Mr. Bachman's version of the confrontation to be more credible than appellant's version. The granting of indefinite administrative leave is a highly unusual under normal circumstances. Under the emergency conditions which existed in the first week of the strike, where the policy was to cancel all leave, it is unlikely that appellant would have been placed on indefinite administrative leave at the very time when his services were most needed by the agency. I also find that appellant's admission that he was not told he was being placed on an indefinite administrative

leave status corroborates Mr. Bachman's contention that such leave was never granted. Finally, I note that appellant picketed the facility before his deadline shift, which I find to be probative evidence of his intent to strike. I find, in short that appellant has not rebutted the agency's prima facie case of his strike participation, and that the agency's charge is supported and sustained by a preponderance of the evidence.

APPELLANTS' REBUTTAL — OTHER CASES

None of the other appellants in this consolidated group (those appellants other than those specifically mentioned above) has presented probative evidence in explanation for their non-appearance from duty during the strike. In view of the failure of these appellants to rebut the agency's prima facie showing that they participated in the strike, I find that the agency has proven its strike charge against these appellants by a preponderance of the evidence. Accordingly, I find that the strike charge is sustained against each of the remaining former controllers within this consolidated group.

AWOL CHARGE

The first element of this charge concerns the fact of appellants' absences from duty during the time charged and their resultant leave status. The second element is the propriety of the agency's action in denying them approved leave during the period of their absences. See *McDonough v. U.S. Postal Service*, 4 MSPB 441 (1980). As stated by the Board in the case of *Giesler v. Department of Transportation*, 3 MSPB 367 (1980), an agency clearly has the right to expect its employees to attend their regularly-scheduled tours of duty "absent a valid excuse."

Evaluating the evidence in these cases, it is clear that the AWOL charges cannot stand against appellants Larry Eden, Jordan Hess, Jerome Iwanski, Robert H. Miller, L. Rodney

Peterson, William Siergey, or Edward Stevens since these appellants were either not shown as AWOL for the period of their absences or they have established a "valid excuse" for their non-appearance at work. In addition, the AWOL charge cannot be sustained against the following three appellants (even though the strike charge was sustained in these cases) since the proposal notice incorrectly charged them with AWOL solely for shifts that they were not expected to work: Terry Anderson, Jeffry Ellis, and Michael Reedy. For the rest of the appellants in the consolidated group, the documentary evidence of record (the pertinent watch schedules, sign-in logs, and time and attendance reports) and the testimony (live and stipulated to) by the facility chief and various other witnesses in this consolidation establishes the fact of their absences and their AWOL status. These appellants do not contest the fact of their absences, or dispute the fact that they were carried in an AWOL status. Moreover, I find that these appellants have not established "valid excuse(s)" for their absences. I therefore find that the agency has established, by a preponderance of the evidence, the property of its action in placing each one of these appellants in an AWOL status for the period of time they were charged.²³ Since the agency has supported each element of its AWOL charge against each of these appellants by the requisite burden of proof, I find that the AWOL charge is sustained against every specially mentioned above.

ANALYSIS AND FINDINGS — AFFIRMATIVE DEFENSES

Both the Civil Service Reform Act and the Board's regulations provide that an agency's action may not be sustained, even when the substantive charges it has advanced have been supported by the requisite burden of proof, when an appellant is able to show that there was "harmful error" in the application of the agency's procedures in arriving at its

decision; that the agency's decision was based on any "prohibited personnel practice" described in 5 U.S.C. 2302(b); or that the agency's decision was not "in accordance with law." 5 U.S.C. 7701(c)(2); 5 C.F.R. 1201.56(b). Appellants have the burden of establishing, by a preponderance of the evidence, affirmative defenses that they propound. *Jones v. Department of the Navy*, MSPB Docket No. PH 07528010141 (July 30, 1981).

By written orders dated February 5, 1982 and August 31, 1982, this Board directed appellants to submit a "statement of facts and issues" in which they cited "any affirmative defenses....and the statutory or regulatory basis for each such defense...." these orders placed appellants on notice that the Board's consideration of affirmative defenses would be limited based on the timeliness of appellants' pleadings and the specificity with which the defenses were propounded. In response to these written orders, appellants' counsel filed a "preliminary" statement of facts and issues on March 4, 1982. This "preliminary" statement was superceded by a subsequent "proposed findings of fact, conclusions of law and list of exhibits" which was filed on October 19, 1982 (as supplemented by an October 26, 1982 filing). The list of affirmative defenses which I will discuss below has been compiled from appellant's final statement of facts and issues, as clarified or as reasonably amplified in closing argument.²⁴

USE OF "CRIME PROVISION"

Appellants argue that the agency's use of the "crime provision" to shorten the notice period was "unlawful."²⁵

Appellants presumably refer to 5 U.S.C. 7513(b)(1) when they argue that the agency's action in this respect was "unlawful." This provision states that employees are to receive "at least 30 days' advance written notice (of a removal action), unless there is reasonable cause to believe the

employee has committed a crime for which a sentence of imprisonment may be imposed...." The record evidence reflects that many (but not all appellants) within the consolidated group were removed before the expiration of 30 days from the date of the letter of intent.

I have found, as discussion in my analysis of the merits of the charges against appellants, that the agency had reasonable cause to believe that those appellants who were absent from regularly-scheduled tours of duty during the strike²⁶ were engaged in the strike and were in violation of 18 U.S.C. 1918, a felony statute which provides for up to one year imprisonment. The Board has held that the agency's invocation of a less than 30 days' advance notice under these circumstances is appropriate and does not constitute error. *Schapansky, supra*, at 8. I therefore find no error in the agency's failure to provide each appellant within this consolidated group a full 30 days' advance notice of his removal.

DISPARATE TREATMENT

Appellants argue that they were "subjected to disparate treatment" because the "striking controllers" who returned to work "pursuant to President Reagan's deadline" were not disciplined.

The above argument fails on two grounds. In the first place, Article 2, Section 2 of the United States Constitution provides the President with the "power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment." I find that in granting a 48-hour moratorium to permit striking controllers to return to work without fear of criminal prosecution or removal from their positions, the President acted in a manner consistent with this power. Since appellants cannot (and apparently do not) argue that the President lacked this power, the only argument remaining is that the scope of this amnesty should have

been (apparently) expanded or modified so as to have included the appellants within this consolidated group. Such an argument is akin to asserting that because one individual is pardoned for his crime, another individual committing a similar crime must also be pardoned. This argument is specious and cannot serve as a basis to reverse the determination made against any of the appellants within this consolidated group.

Appellants' argument must also fail in view of appellants' failure to establish that disparate treatment was accorded to two similarly-situated groups of employees. While both classes of employees were on strike at one time, the appellants in this consolidation (other than the referenced individuals against whom the agency failed to establish a prima facie case of striking) continued their participation in the strike past the amnesty period. They were afforded the same chance at accepting amnesty for their past actions as was the class of employees who returned to work,²⁷ but, in contrast to that class, declined to accept it. Therefore, while the circumstances of these two classes of employees are similar in some respects, they differ significantly in that appellants failed to report for their deadline shifts.

"COMMAND CONTROL" ARGUMENT

Appellants assert that the President was the de facto proposing and deciding official in their cases in view of his action providing a 48-hour moratorium period (which "stripped" proposing officials of their power to take any action during that time) and his stated intent that all controllers who did not return would be fired. They reference various statements by agency officials²⁸ to the effect that non-returning controllers would be terminated and call attention to GENOT 127 (August 4, 1981) (which states that controllers who miss their deadline shifts will receive

proposed removal notices) as further evidence that the actual proposing and deciding officials had no real authority to do anything other than to remove the controllers who were allegedly on strike. Appellants argue that these national officials, who "controlled (their removals) to the smallest degree," exercised "command control" which resulted in making a "sham" out of the nominal decision-making process. (TR: Vol. 17, pp. 101-104)

Although appellants correctly contend that proposing and deciding officials were advised of and were no doubt aware of the national policy (set by the President and implemented by national agency officials)²⁹ that all striking controllers, except those who returned to duty for their deadline dates, should be terminated,³⁰ they overlook the significant point that the agency specifically left to these officials the power to determine which of these controllers actually participated in the strike. GENOT 141, for example, provides guidelines that deciding officials should consider in determining whether individual controllers were on strike. These controllers were provided with a legitimate reply opportunity, and deciding officials had authority to rescind the letter of intent if, in their opinion, the circumstances did not warrant the removal action. This authority is evidenced by a list of numerous controllers whose proposal notices were rescinded following their issuance. (See Appendix I - information requested in paragraph 17 of the Board's discovery order ALJ-1).³¹ Individual determinations such as these were properly made by local officials, and I find no validity in appellants' assertion that President Reagan acted, in effect, as the deciding official in these cases.

The President's authority to grant amnesty for those controllers who returned to work for their deadline shifts has previously been discussed in this decision, and no further elaboration of that issue need be set forth in this paragraph

(as it relates to appellants' claim that the President "stripped" local officials of their authority).³² I find, in short, that there is no merit to appellants' claim of improper "command control" and that error is not shown from this record.

RIGHT OF REPLY TO LETTER OF INTENT

Appellant's primary affirmative defense (and one which elicited considerable testimony at the hearing) concerns the agency's alleged abrogation (for approximately one-third of the appellants in this consolidated group) of the statutory provision (5 U.S.C. 7513(b)(2)) requiring "a reasonable time, but not less than 7 days..." to respond to a letter of intended removal. Other related issues raised on appeal are the agency's alleged improper action (for all appellants from the Chicago Center (ZAU) facility) in failing to appoint properly-qualified oral reply officials vested in the authority to recommend final decisions on the proposed actions and the purported denial (in certain other facilities) of the right to reply.

FINDINGS OF FACT — 7-DAY RESPONSE TIME

Before discussing the applicability of the referenced portion of the statute which states that an appellant shall have 7 days to respond to the letter of intent, I will make findings of fact concerning which appellants, in this consolidated group, received less than a 7-day reply period. In calculating an appellant's receipt of his proposal notice, I have taken the earliest of the following dates: the receipt date shown on the certified receipts which are a matter of record (all proposal notices were sent by both certified and regular mail), 3 days from the mailing date of the letter of intent (the rule used by FAA officials and adopted by appellants in their argument to determine when - in the absence of other information - an appellant received his proposal notice), and the date appellant himself stated, in his petition of appeal, that he received

his proposal notice.³³ I have only examined the case files of those individual appellants cited by appellants' counsel in his closing argument in determining which appellants received less than 7 days to respond to the letter of intent.

Concerning the manner in which the 7 days is counted, appellants argue that the date of receipt of the letter and the date of the reply must be excluded as a dates, with at least 7 days passing in between. In support of this argument, they cite the case of *Stringer v. United States*, 90 F. Supp. 375 (Ct. Cl. 1950), in which the court, in calculating the 30 day advance notice period for an adverse action, held that the date of receipt of the notice must be excluded as one of the dates and the last date must be a complete day (the notice period had to extend to until at least the last minute of the 30th day following the date of the notice).

This interpretation is the most liberal one that can be applied in counting the reply period, since it would, in most cases, result in a requirement of more than 7-day reply period. Nevertheless, in some cases (such as when an employee received his notice at 4:00 p.m. and replied to it at 10:00 a.m. on the 7th day following his receipt) a requirement that the employee respond on the 7th day would mean that he would have (in the words of counsel) received "6.5 or 6.9 days" to respond. (TR: Vol. 17, p. 76) For this reason and in view of the *Stringer* finding (in an analogous case), I will adopt appellants' argument concerning the calculation of the 7-day reply period for purposes of these findings of fact. (For example, if a letter of intent was received on August 7, the employee - to have received (in all cases) 7 full days to respond - should have been required to give his response no sooner than August 15.)³⁴

Using the above methods of calculation, I find that 80 appellants within this consolidated group gave one or both of

their replies (as noted infra, even though many appellants gave their oral replies within 7 days, many of these same appellants had more than 7 days to submit a written response) in less than 7 full days from their receipt of the letter of intent. These appellants (and the number of days they receive to reply to the letters) are listed in Appendix B.

THE "RATLEY ISSUE"

On September 17, 1982, the Board issued a decision (*Ratley v. Department of the Army*, MSPB Docket No. AT07528110338), in which it found that the agency's failure to accord the appellant in that case 7 days to reply to the proposed removal notice (she was given a reply period of one day) was "inherently unreasonable," that it was in violation of the pertinent statutory provision requiring a 7-day reply period (and thus in violation of the law), and that the agency's action "clearly constitute(d) harmful error under 5 U.S.C. 7701(c)(2)(A)." Appellant's counsel argues that this decision mandates reversal of the agency's action (without the necessity for any discussion of "harmful error") for each appellant in this consolidated group who received less than 7 days to reply to the proposal notice.³⁵ He notes, in this respect, that the "harmful error" analysis is only applicable to a violation of FAA regulations (not statues or OPM regulations) since the "harmful error" statutory provision (5 U.S.C. 7701(c)(2)(A)) states in pertinent part, that it is incumbent upon an appellant (where applicable) to show "...harmful error in the application of the agency's procedures in arriving at such decision (the adverse action)...." (underscoring added). The agency counters by arguing that the controlling case here is the Board decision of *Parker v. Defense Logistics Agency*, 1 MSPB 489 (1980), which (it argues) stands for the proposition that procedural errors (such as those alleged to have occurred here) may not serve as a basis for reversal of an agency action absent a showing by ap-

pellants of harmful error. It further states that since no appellant within this consolidated group has made such a showing, no case should be reversed on this basis.

The statutory provisions at issue are a part of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111. Both the House of Representatives and the Senate noted in committee reports concerning this legislation that it was not the intent of the bill to subject agencies to reversals of otherwise proper disciplinary actions based on technical procedural oversights which do not substantively impair the employee's rights.³⁶ Based on a review of this legislative history of the Civil Service Reform Act, it is clear that Congress did not intend to enact legislation which would permit the reversals of removal actions based upon technical grounds which are of no consequence in evaluating the validity of the charges.³⁷

With this background in mind, I will briefly look at some Board decisions which are relevant to this issue. The *Parker* case cited by the agency takes due notice of the congressional history of the Civil Service Reform Act in finding that agency actions should not be reversed "because of technical procedural oversights which have not substantially prejudiced or impaired the employee's rights." *Parker* at 492. Following this threshold finding, the Board analyzed whether the appellant before it had shown harmful error concerning the agency's alleged erroneous application of OPM regulations. This case was followed by a line of other cases which applied the "harmful error" test to alleged agency violations of OPM regulations and/or statutes. See *Hockman v. American Battle Monuments Commission*, MSPB Docket No. SF07528110757 (July 30, 1982); *Messersmith v. General Services Administration*, MSPB Docket No. DC07528010253 (December 2, 1981); *Graham v. Postal Service*, 2 MSPB 377 (1980); *Hunger v. Department of the Interior*, 2 MSPB 274

(1980). Moreover, the Board has specifically held that it will apply the "harmful error" test to an agency's purported failure to permit an appellant 7 days to respond to a letter of intent. See *Johnson v. Department of the Treasury*, MSPB Docket No. DC075209213 (August 27, 1982).

The *Ratley* case (although the analysis contained therein would appear to be at odds with these precedents) is not as clear-cut a precedent for appellants' proposition (that any reply period of less than 7 days, regardless of the attendant circumstances, warrants reversal of the agency's action) as appellants would indicate in their argument. In the first place, the *Ratley* holding must be viewed in context of the factual circumstances of that case. That appellant was only given one day to make her reply to the notice (less time than any appellant in this consolidation), and she was (as indicated in the Board's decision) apparently precluded (as a result of the short notice period) from bringing specific medical evidence before the oral reply official (a situation, as noted infra, unlike the circumstances which were involved in the cases here). Moreover, the Board in *Ratley* did make a finding that there was a showing of harmful error in the case. Accordingly, it cannot be concluded that the Board in *Ratley* rejected its previous line of precedents concerning the applicability of harmful error to the violation of a statutory right.

Concerning appellants' apparent argument that the language of the statute itself makes it clear that Congress intended that only a violation of agency regulations should be evaluated under the "harmful error" test, I am unable to conclude, as do appellants, that "agency's procedures" (as quoted supra - from the statute) is synonymous with the phrase "agency's regulations." A reasonable reading of this statute would instead indicate that should an agency violate, through the application of its procedures in disciplining an

appellant, a statute or regulation, the appellant must show harmful error for the action to be reversed. I therefore find that this argument does not demonstrate the inapplicability of the harmful error approach to reviewing purported statutory violations.

I find, based on a review of the above-referenced Congressional intent, the Board's findings in cases similar to this, and the remainder of the above analysis, that the most reasonable test to apply to appellants' contention of error in this case is the "harmful error" test.

Applying that test to these cases, I first note that the Board has found (as noted in *Jones, supra*) that the burden is on appellants to establish affirmative defenses by a preponderance of the evidence. The Board has specifically noted that this burden extends to allegations of harmful error. *Parker* at 492. As referenced above, (See footnotes 12 and 24) appellants were placed on notice concerning the need to provide specific argument concerning individual appellants. Appellants' counsel has not presented argument (with respect to individual appellants) concerning how they were harmed by their lack of 7 days to reply to the letter of intent. In view of this lack of a showing of harm, I find that appellants have not established, by a preponderance of the evidence, error in this respect, and the allegation of error must be dismissed.³⁸

SPECIAL SITUATIONS — RIGHT OF REPLY

SPRINGFIELD, IL (SPI)

No appellant in this consolidated group at this facility had an oral reply. (TR: Vol. 16, pp. 152, 156) The record concerning this facility reflects that every controller failed to show up for work, and facility chief Mr. Thomas Glaze testified that as a result of the strike, he personally had to work

every position in the tower. (TR: Vol. 16, p. 171) He stated that he requested the representative for all of the SPI appellants in this consolidated group to contact his clients and have them call the facility to work out a schedule of appearances for the oral replies, but that the representative refused to do this. (TR: 153-155) As a result of the failure of this representative to arrange for his clients to call the facility and work out a schedule of appearances and Mr. Glaze's busy schedule (which, he testified, left him no time to attempt to work out a schedule for the approximately 25 controllers who worked at the facility),³⁹ no orals were held. (TR: 171) Appellants argue on appeal that the agency denied them their right to an oral reply, and that their removals should be reversed on this basis.

I find no merit in appellants' assertion. In the first place, oral replies were not denied at the facility since (as noted in footnote 39) oral replies were held for those individuals who called the facility and worked out a scheduled appearance. In view of the action by all controllers at the facility in failing to report, this requirement (to call the facility to schedule a reply) was reasonable and was not an onerous predicate to the right of reply as appellants apparently assert. In view of the reasonableness of this requirement and appellants' failure to comply with the requirement, I find no error by the agency in this respect. Moreover, even assuming that there was error, appellants have not shown the harm of the error (under the "harmful error" approach), and I therefore find that this allegation cannot serve as a basis for reversal of any of these removal actions.

GREEN BAY (GRB)

The documentary evidence for this facility would indicate that no orals were held, but the representative of the individuals within this consolidated group, Mr. Phillip Marbs,

stated that they were held "under protest" (due to the short length of time to prepare for them). (TR: Vol. 10, p. 183) Marbs stated that he asked some general questions of during the oral replies. He stated that he advised the controllers that he was there to listen to their replies, and not to answer questions. (TR: Vol. 16, pp. 141-144) Appellants argue that this policy transformed the oral replies into a "fool's joke." (TR: Vol. 17, p. 231)

Mr. Lowe's refusal to answer questions during the oral reply process was (arguably) an error in these cases. (See discussion infra regarding the ZAU appellants). Nevertheless,, even assuming error, appellants do not argue, nor have they shown, that they were thereby harmed. Accordingly, I am unable to find reversible harmful error on this record.

ZAU ORAL REPLY OFFICIALS

As referenced above, appellants' counsel also contends that the agency (with respect to the ZAU appellants) erred in its designation of oral reply officials and in the scope of authority given to those officials in their handling of the oral replies. In particular, counsel argues that the ZAU oral reply officials were not employees of the agency, were not "authority figures," had "no training or expertise," and were "strangers to the appellants." (TR: Vol. 17, p. 125) Moreover, he asserts that they had no authority to recommend a final decision in any of the cases, that they informed appellants of this lack of authority at the start of the oral replies, and that they did not answer any questions (during the replies) about the charges. (TR: 123, 124) He argues that the agency's actions in this respect were in violation of OPM regulation 5 C.F.R. 752.404(c)(2), which states that the agency "shall designate an official to hear the employee's oral reply who has authority either to make or recommend a final decision on the proposed adverse action..." He further references two

decisions issued by the United States Court of Claims (*Ricucci v. United States*, 432 F.2d 453 (Ct. Cl. 1970) and *Ricucci v. United States*, 425 F.2d 1252 (Ct. Cl. 1970) in support of his argument. He argues that these cases stand for the proposition that the oral replies were not meant to be "meaningless" and "futile ritual(s)," that the oral reply official should have had the competence to have engaged (if necessary) in a discussion with the employee making the reply, and that the reply officials should have had the authority to make a meaningful recommendation concerning the final disposition of the case to the deciding official.

Chief Gunter testified that he appointed "8 or 9" individuals (he provided the names of 8 officials) to hear the oral replies at the Chicago Center. (TR: Vol. 1, p. 65; Vol. 2, p. 31) He stated that he made an assumption, based upon his "direct" and "indirect" knowledge of the oral reply officials, that they were qualified for this job since they had, at some point in their careers, been involved in the proposing of disciplinary actions, the hearing of oral replies, and/or the taking of final disciplinary actions. He noted, in this respect, that he required his oral reply officials to have been (at some point) a supervisor. (TR: Vol. 2, pp. 32-38) He stated that all of the oral reply officials, with the exception of one, were retired from the FAA, and that these retired individuals were rehired specifically to hear these oral replies. (TR: Vol. 2, p. 34, 37) Gunter further stated that he instructed these officials to listen to what the employees had to say and not to get into a confrontation with them. (TR: Vol. 2, pp. 38, 50) Concerning the authority of these individuals, Gunter stated they could only notate on a form (with - the record shows - clarifying comments added, if necessary) whether they recommended "further facility discussion" of a particular case. (TR: Vol. 2, p. 53) Gunter admitted that although he reviewed the recommendations of the oral reply officials, he

treated all case files the same, whether or not "further facility discussion" was recommended. (TR: Vol. 1, p. 66; Vol. 2, p. 54) Following his review of the oral replies given at the facility, he returned 8 controllers to their jobs. (TR: Vol. 2, p. 55)

The record evidence (the file copy summaries of the oral replies and the hearing testimony) reflects that the oral reply officials handled their responsibilities, with slight variations, in a similar manner. They generally advised appellants that they were responsible for listening to and recording the replies and that Mr. Gunter had the final authority in the cases. These officials engaged in short question and answer sessions with appellants, and some of them made recommendations concerning the final disposition of cases in their written summaries.

I will first address the issue of the standard of proof necessary for a determination of whether the agency's handling of ZAU oral replies constitutes fatal error in these cases (as with the sign-in log argument, counsel requests that all ZAU cases be reversed on this basis - TR: Vol. 17, p. 122). The analysis which I have stated above concerning the 7-day issue is apropos here insofar as requiring appellants' to establish "harmful error" for the actions to be reversed. I further note that the Board has in the past evaluated allegation of oral reply error under the "harmful error" approach. See *Swindell v. Veterans Administration*, MSPB Docket No. NY07528110114 (June 14, 1982). I therefore find that a "harmful error" analysis must be used in evaluating the allegations of error made here.

In these cases, the agency arguably violated the provisions of 5 C.F.R. 752.404(c)(2) (that the oral reply officials should have authority to make a final decision or recommend a final decision) since the weight of the ZAU oral reply recommen-

dations must be considered as questionable in light of Mr. Gunter's testimony that he considered all files in the same manner. Moreover, the *Ricucci* cases do hold, as appellant asserts, that the oral reply official must have authority beyond merely recording the reply, that he must have sufficient knowledge of the action to engage in some reasonable "give-and-take discussion" of the case with the employee, and that his recommendation must carry some degree of weight in the deciding official's consideration of the case.

Notwithstanding these apparent errors, I do not find that any harm inured to any ZAU appellant based on these replies since appellants have failed to show, by a preponderance of the evidence, that the agency might have reached a different result than it did had other oral reply officials (more in line with the prerequisites stated by appellants) been appointed to hear the replies. One need look no further than to examine the case files for all the ZAU appellants. Almost without exception, all appellants merely rested on the record and refused to make any substantive comments on the charges against them.⁴⁰ In view of this record, appellants have not met their burden of showing that had another official been present (or had the oral replies been handled differently) the final agency results might have been different.⁴¹

In making the above finding, I note that the Court of Claims (the same court which five years earlier decided the *Ricucci* cases) evaluated an employee allegation of error (under a "harmful error" approach) when the employee had "no intention of discussing factual issues" (at the oral reply) and engaged in a "cat-and-mouse game" with the oral reply official. The court found, notwithstanding the inadequacy of the oral reply official's qualifications to hear the reply, that any error was "harmless" in view of appellant's corresponding silence. It stated (in a finding most appropriate to the cir-

cumstances in these cases) that "deficiencies in mere ritual should not by themselves trip up an agency in an adverse action if the employee gets the substance of what is realistic to expect in the circumstances." *Peden v. United States*, 512 F.2d 1099, 1102 (Ct. Cl. 1975). In short, I find no harmful error here, and appellants' allegation is dismissed.

SUSPENSION DURING NOTICE PERIOD

This issue, which appellants raised for the first time in their March 4, 1982 statement of facts and issues, is not an affirmative defense to the removal actions since appellants do not assert through this argument that the removal actions are defective. Instead, it constitutes an independently appealable action under 5 U.S.C. Chapter 75.⁴²

The filing requirements for appeals to the Board are contained in the Board's regulations at 5 C.F.R. 1201.22 and 24. These regulations require an appellant to file, within 20 days of the effective date of the action,⁴³ a petition in which he states the nature of the action appealed, the effective date of the action appealed, and a statement of the reasons for his belief that the action is wrong. It is further incumbent upon appellant to establish, by a preponderance of the evidence, the Board has jurisdiction over his appeal. *Spiegel v. Department of the Army*, MSPB Docket No. NY075280109005 (May 4, 1981).

In this consolidated group of cases, these prerequisites have not been met. No appellant within this consolidated group has filed an appeal from the alleged suspension actions in which he states the reasons for his appeal and the date of the action.⁴⁴ Instead, counsel representing appellants on other appealable actions had, in response to a Board order which directed him to provide the facts and issues which he will argue on appeal of those actions, submitted argument by which he hopes, through a bootstrapping method,

to add new appeals to the old appeals.⁴⁵ I find no authority for this proposition and conclude that these alleged suspensions are not properly before the Board for adjudication.⁴⁶

EFFICIENCY OF THE SERVICE

An adverse action may, by statute, only be taken "for such cause as will promote the efficiency of the service." 5 U.S.C. 7513(a). The Board has held that disciplinary actions based upon unauthorized absences are founded upon proper cause since such absences "by their very nature disrupt the efficiency of the service." *Desiderio v. Department of the Navy*, 4 MSPB 171 (1980). In *Schapansky*, the Board held that adverse actions based upon the prohibition against striking stated in 5 U.S.C. 7311 promote the efficiency of the service. In view of these Board holdings and the obvious disruption to the agency's mission which was caused by the action of the striking air traffic controllers, I find that the disciplinary actions here are founded upon proper cause.

APPROPRIATENESS OF THE DISCIPLINARY PENALTY

In the case of *Douglas v. Veterans Administration*, MSPB Docket No. AT075299006 (April 10, 1981), the Board held it may mitigate (under certain circumstances) an agency's choice of disciplinary penalty. Citing previous Board precedents established in *Special Counsel v. Dukes* MSPB Docket No. HQ12060020 (October 29, 1981) (30-day minimum suspension penalty under the Hatch Act - 5 U.S.C. 7324) and *Woody v. General Services Administration*, MSPB Docket No. SF07528110028 (June 2, 1981) (one-month minimum penalty under 31 U.S.C. 638a(c)(2) for the misuse of a government vehicle), the Board held in *Schapansky* that "this rule (mitigation) does not apply if the statute under which the employee is removed imposes a mandatory minimum penalty."

5 U.S.C. 7311 provides that an employee may not "hold" a position in the Government of the United States if he participates in a strike against it. This statute can be read as mandating the removal from the service of a federal employee who is found to have participated in a strike against the Government of the United States. The reasonableness of this interpretation is illustrated by a recent decision of the United States Court of Appeals for the Ninth Circuit, which held that an agency could not be required (based on a mitigation theory) to return to service an employee who had been removed under 5 U.S.C. 7311 for participation in a strike against the Government of the United States. *American Postal Workers v. U. S. Postal Service*, 682 F.2d 1280, 1285 (9th Cir. 1982). I find, in short, no basis for accepting appellants' arguments that the penalty in these cases should be mitigated, and I conclude that the agency properly determined, for each appellant within the consolidated group who participated in the strike,⁴⁷ that removal was the proper disciplinary penalty to impose.⁴⁸

DECISION

The agency actions taken against appellants Larry Eden, Jordan Hess, Jerome Iwanski, Robert, H. Miller, L. Rodney Peterson, William Siergey, and Edward Stevens are reversed. The agency is hereby directed to cancel the removal actions taken against these appellants and to furnish evidence of compliance to the Board's Chicago Regional Office within ten (10) calendar days after this decision becomes final.

Any party seeking enforcement of a final decision of the Board may file a petition for enforcement with the regional office that rendered the initial decision. Such petition should be directed to the Regional Director and must comply with the requirements of 5 C.F.R. 1201.181(d).

The adverse actions taken against the other appellants within this consolidated group are sustained.

This decision is an initial decision and will become a final decision of the Merit Systems Protection Board on February 22, 1983, unless a petition for review is filed with the Board or the Board reopens the case on its own motion.

Any party to this appeal or the Director of the Office of Personnel Management may file a petition for review of this decision with the Merit Systems Protection Board. The petition must identify specifically the exception taken to this decision, cite the basis for the exception, and refer to applicable laws, rules, or regulations.

The petition for review must be filed with the Secretary to the Merit Systems Protection Board, 1120 Vermont Avenue, N.W., Washington, D.C. 20419 no later than thirty-five (35) calendar days after the issuance of the initial decision, cite the basis for the exception, and refer to applicable laws, rules, or regulations.

The Board may grant a petition for review when a party submits written argument and supporting documentation which tend to show that:

- (1) New and material evidence is available that, despite due diligence, was not available when the record was closed; or
- (2) The decision of the presiding official is based on an erroneous interpretation of statute or regulation.

Pursuant to 5 U.S.C. Section 7703(b)(1), (as modified by Section 127 of the Federal Court Improvement Act of 1982, to be codified at 28 U.S.C. Section 1295(a)(9)) the appellant has the right to seek judicial review of the Board's final decision on this appeal. A petition requesting such review

must be filed with the U.S. Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D. C. 20005, no-later than 30 days after appellant's receipt of the Board's final order or decision.

For the Board

Stephen E. Manrose
Presiding Official

— 100a —

FOOTNOTES

¹ The specific dates on which appellants were charged with AWOL varies.

² By order dated May 28, 1982, the Board took official notice of the existence of a nationwide strike by PATCO from the period August 3 through 6, 1982. *Ketchem v. Department of Transportation*, MSPB Docket No. DA075281F0713 (May 28, 1982). The Board stated that the FAA only had to prove the existence of a strike for those controllers whose return-to-work dates were on "dates subsequent" to August 6, 1981 *Id.* at 9. It later denied a "motion for clarification" by appellants' counsel who petitioned the Board for a ruling on whether its order in *Ketchem* was limited to controllers whose shifts began before 8:00 a.m. on August 6, 1981. *Ketchem v. Department of Transportation*, MSPB Docket No. DA075281F0713 (November 23, 1982).

³ Many, but not all, of the controllers in this consolidation were charged with striking not only on their deadline dates but also on August 3, 4, and 5 (for shifts starting before 11:00 EDT), 1981.

⁴ Record evidence reveals that there was picketing activity at 26 out of the 38 air traffic facilities in this consolidated group. (The record is not clear, in the case of some facilities, whether or not picketing occurred, but the record does show that some controllers, who were employed at facilities where there was no picketing, picketed at other facilities within this consolidated group where there was picketing.) The record further shows that picketers at many of these sites carried signs indicating they were on strike, including some signs which directly stated "PATCO on strike." This picketing activity lasted at most facilities past the first week of the strike, and at some facilities it lasted until October and November, 1981. The last picketing activity indi-

cated from this record was on December 11, 1981, at the Chicago Center (ZAU). (TR: Vol. 1, p. 60)

⁵ Appellants' counsel identified appellant Thomas Toepfer (ZAU), who had a scheduled reporting time of September 7, 1981, as the individual with the latest deadline date in this consolidated group. (TR: Vol. 17, p. 173)

⁶ GENOT 128 set the policy of the agency concerning controllers who missed their deadline shifts. It advised facility chiefs that these controllers should be placed in a temporary non-duty status and be issued a proposed removal notice. Counsel for both parties in this case agreed to the use of the term "locked out" as meaning that controllers who had not reported for their deadline shifts were not permitted to return to work. (TR: Vol. 2, p. 27; Appellant's Hearing Ex. 29 - stipulated testimony)

⁷ Notwithstanding the large number of appellants in this consolidated group, the appellants in this consolidation comprise only a small percentage of the total number of air traffic controllers who were removed, on a nationwide basis, for strike participation (more than 11,000). It is reasonable to assume that some of these appellants had later deadline dates than the last deadline date which is a matter of record in this consolidation.

⁸ Counsel argues that picketing activity by controllers after their deadline dates is not probative evidence of their strike participation since they were "locked out" of their facilities. Under the "objective test" I adopt infra for determining whether employees could be on strike if they were unable to return to duty, I find that counsel's argument is well taken, and that picketing activities, for those controllers who were already "locked out" of their facilities, should not be considered as material evidence in support of their personal participation in the strike. At the same time, however,

the courts have held - in a long line of cases dealing with the issue of whether an individual's actions are part of a "concerted activity" under the National Labor Relations Board Act - that individual actions, particularly if they are designed to have an effect on and are intended to enlist the support of other employees (a circumstance clearly in evidence here in view of the large number of individuals who regularly congregated in front of many of the air traffic facilities in this consolidated group), can be deemed to be part of a "concerted activity." *Krispy Kreme Doughnut Corp. v. N.L.R.B.*, 635 F.2d 304, 307 (4th Cir. 1980); *Pelton Casteel, Inc. v. N.L.R.B.*, 627 F.2d 23, 28 (7th Cir. 1980); *Anchortank, Inc. v. N.L.R.B.*, 618 F.2d 1153, 1161 (5th Cir. 1980). I therefore find that the picketing by a number of controllers, some of whom were already "locked out," can properly be described as "concerted activity" in support of the strike and as probative evidence concerning the strike activity of those controllers who were not "locked out" at that point. I further note parenthetically that the actions of the picketers at the FAA facilities in this consolidated group, even after most or all of their deadline dates had passed, were in furtherance of the strike activities of all other controllers, on a nationwide basis, who had not yet reported for their deadline shifts. As such, the picketing activity which occurred here provides additional evidence of the continuing nature of the nationwide strike, even beyond the deadline shifts for all the controllers within this consolidated group.

⁹ Appellant cites, as one such statement, an August 5, 1981 statement by Secretary of Transportation Drew Lewis that "as of 11 o'clock today, the strike is over." (Quoted in *United States v. PATCO*, 524 F. Supp. 160, 164 (D.D.C. 1981)). I note parenthetically that different agency officials made different statements concerning the end of the strike. For example, the Administrator of the FAA, J. Lynn Helms,

stated on August 5 that "...the strike continues...." (5:30 p.m. Briefing to the Press, as referenced at page 36 of appellant's "Evidentiary Appendix.")

¹⁰ I make no findings, at this point, on the legitimacy of appellants' reasons for the withholding of their services. That issue must be evaluated on review of appellants' various explanations for their absences. Where no explanation is provided, the agency may, as noted *infra*, prove appellants' strike participation by appellants' failure to rebut a prima facie showing that they were on strike.

¹¹ Based upon the inability of this facility chief to appear at the hearing, appellants' counsel moved that all of the Meigs cases be summarily reversed due to the lack of "foundation" for pertinent hearing testimony. (TR: Vol. 15, pp. 60, 61) For reasons stated in the record, I denied that motion.

¹² Appellant's amended statement of facts and issues, received by the Board on October 20, 1982, provided a general statement of the nature of the defenses which would be presented by individual appellants on appeal. This Board advised counsel (TR: Vol. 17, p. 210) to provide specific argument for those cases that he wished to have addressed by the Board in its decision (beyond the general discussion applicable to all other appellants).

¹³ Appellants' counsel introduced into the record, as an addendum to his oral closing argument, a "check list" of appellants for whom (allegedly) two sets of sign-in logs exist. This "check list" would, according to counsel, indicate that approximately 100 out of the more than 200 ZAU appellants in the consolidated group have "doctored" sign-in logs.

¹⁴ The agency requested that Mr. Robert Miller, personnel management specialist, testify concerning the apparent changes in the logs, but I sustained a strenuous objection

posed by appellants' counsel to his testimony based on my previous order that all witnesses (other than appellants) be sequestered during the hearing and Mr. Miller's presence during the hearing as a technical advisor (even after it became clear that his testimony concerning these logs might be needed). (TR: Vol. 6, pp. 79, 80, 83) I also sustained appellants' objections to permitting the record to remain open for additional agency witnesses (other than Mr. Miller) to testify concerning this issue in view of the agency's failure (despite ample notice) to produce these witnesses during the portion of the consolidated hearing in which the Chicago Center (ZAU) cases were heard. Appellants themselves produced absolutely no evidence concerning these two sets of sign-in logs.

¹⁵ The arguments and evidence for those appellants who I find did not withdraw their services from the agency during the strike are also discussed in the following portion of this decision.

¹⁶ This case is distinguishable from the *Anderson* (ZAU) case in that this appellant, in contrast to appellant Anderson, was charged solely for shifts missed after he was locked out of the facility.

¹⁷ This finding is consistent with the Board's statement (made in its second *Ketchum* order - dated November 23, 1982) that the agency's burden of proof on the strike charge "includes proof of authorized absence which in turn requires specific proof that the agency would have allowed an individual appellant to return to work in cases where that point is in issue."

¹⁸ GENOT 127 advised facility chiefs that controllers who failed to report for duty on their first regularly-scheduled shifts after 11:00 EDT on August 5, 1981 should be issued termination notices. The GENOT further stated

that facility chiefs were "encouraged" to pass this information along to "FAA controllers." MWC facility chief Joseph Jasper testified that he "personally" did not send this GENOT to the striking controllers and that he "wasn't sure" if it was sent to them with the other "various messages." (TR: Vol. 10, p. 61)

¹⁹ Much evidence was elicited on appeal concerning the failure of facility chiefs in this consolidation to distribute copies of GENOT 127 to the striking controllers, and counsel argues that the agency was "obligat(ed)" to pass the contents of the memorandum along to the striking controllers. (TR: Vol. 17, p. 99) While, as noted in my discussion of the *Streitenberger* (MWC) case, it would have been desirable for the agency to have so distributed the memorandum, counsel's argument ignores the extra time it would have taken the agency to contact the striking controllers in this consolidation (many of whom could not be reached), the critical manpower shortage of the agency and the overriding need to safely guide the nation's airplanes with what personnel was available, and the essential responsibility of each controller to determine for himself what his own schedule was and when he was expected to report for duty. For these reasons, I am unable to find substantial merit with this claim, or find that it constitutes a basis for reversing any agency action in this consolidation.

²⁰ Mr. Stoike's testimony concerning the point that appellant would have been locked out is somewhat confusing since he responded affirmatively to a leading question which indicated that the lock-out time was the missing of the deadline shift and later responded affirmatively to another leading question which indicated that the mailing of the proposal notice was the controlling time in determining the lock-out. (TR: 134, 135) Since a reading of this section of the transcript clearly shows that the witness intended that the proposal

notice would only be mailed after a controller actually missed his deadline shift, I find that a reasonable interpretation of this testimony establishes that the missing of the deadline shift, not the mailing time of the proposal notice, is the controlling time insofar as determining whether an individual controller was locked out of the facility.

²¹ The pertinent watch schedule reflects that not only was this appellant's annual leave for the period of the strike cancelled, but that one day of annual leave for August 2 was cancelled. While this action was arguably a violation of the agency's collective bargaining agreement, I find this fact has no relevance in this case since I have considered the agency's actions only as they relate to the time period of the strike. Should appellant have decided to contest the arguably improper cancellation of his leave on August 2, his recourse (under Article 7 of the agreement) was through the grievance process.

²² Appellant introduced into the record a November 3, 1981 court order with back-up documents (including a transcript of proceedings on August 7, an August 6 affidavit, and other motions and responses thereto) which indicate his involvement with litigation activities during the first week of the strike. Even assuming that these litigation activities would have precluded appellant from appearing at facility for his deadline shift, there is no evidence that appellant called the facility to request court leave or that he otherwise notified them, in a proper manner, of his absence. Under these circumstances, I find that these litigation activities cannot serve to rebut the prima facie case. (See Holic (ZAU) case)

²³ It should be noted (in the event that any of the appellants in this consolidated group - against whom the AWOL charge has been sustained - have been incorrectly charged

with AWOL for a portion of the time cited in their proposal notices) that a finding that they were correctly charged with AWOL for any portion of the time cited in their notices is sufficient to sustain the AWOL charge.

²⁴ In view of the general nature of appellant counsel's statement of facts and issues, insofar as it concerned the individual defenses of appellants, I advised counsel (as referenced in footnote 12) that he would be expected to specifically argue, in his closing statement, the individual defenses of the different appellants. No such requirement was specified concerning the general affirmative defenses that appellants propound. The list of affirmative defenses discussed in this decision, therefore, is comprised of all such defenses which appellant has specifically advanced on appeal (e.g., a general statement - contained in appellants' final statement of facts and issues - that "appellants' removals constituted a prohibited personnel practice" is not discussed due to the lack of specificity of the argument).

²⁵ Typical proposed removal notices within this consolidated group were based on guidance provided on GENOT 129 (August 5, 1981), and state, in pertinent part, that an appellant's purported strike participation provides "reasonable cause to believe that (he) ha(s) committed a crime for which a sentence of imprisonment can be imposed...", that (for this reason) appellant's reply, if any, should be made within a "7-day limit," and that a decision on the proposed action would thereafter be made "as soon as possible." in practice, many appellants were removed well within a 30-day period from their receipt of the initial letter of intent.

²⁶ As discussed above, the agency failed to establish a prima facie case of participation in the strike against 7 appellants within this consolidated group. For those appellants,

the agency's invocation of the "crime provision" was arguably improper. I will not address that issue in this decision in view of my determination that the removal actions against those appellants must, in any event, be reversed.

²⁷ Approximately 1,200 controllers returned to work under the President's amnesty program (as implemented by the agency). See *PATCO v. United States Department of Transportation*, 529 F. Supp. 614, 615 (D. Minn. 1981).

²⁸ For example, FAA Administrator Helms stated, in a press briefing given at 10:30 a.m. on August 4, 1981, that "those people who have not reported for work...will receive notice of termination..." and Secretary of Transportation Drew Lewis stated at the same briefing that "whatever legal steps have to be taken to cause this termination, we are prepared to go through that." (Appellants' "Evidentiary Appendix", pp. 29, 31)

²⁹ Administrator Helms stated, during his national deposition testimony (at TR: 38, 40, 53, and 112), that he was not directed by President Reagan to forward termination notices to controllers and that he himself made the decision that they should be terminated. (See relevant portions of Appellants' Group Exhibit 2, as contained under tab 49 of the master file).

³⁰ In view of the authority of local officials to make individual determinations in individual cases, as noted *infra*, I find that there was no improper usurpation of their authority. Concerning appellants' apparent contention that deciding officials should have determined, within a broad range of penalties - ranging (presumably) from a short-suspension to removal, what penalty they felt was appropriate when a finding was made that an employee was on strike, I find merit in the agency's policy of treating these cases in a uniform manner. Certainly it cannot be reasonably argued that to have

multitudinous penalties imposed for identical offenses by the numerous deciding officials involved in these cases would constitute an equitable and fair treatment of this matter. No doubt appellants' claim of "disparate treatment" would be viewed in a different light under these circumstances. Secondly, I note that not one of the proposing or deciding officials in this consolidated group testified that he took the actions he did against his will or that he disagreed with the determinations made here. Finally, it is quite arguable, and I do find *infra*, that removal of these employees was the most reasonable penalty for their offenses. As the head of his agency, Administrator Helms made a proper determination concerning the penalty that should be imposed, and he communicated this policy determination via the normal means (GENOT) for transmittal of such determinations.

³¹ These documents, as well as the various GENOTs which have been referenced in this decision, are contained within the previously-referenced "evidentiary appendix" submitted by appellant on appeal. Portions of this appendix may be found under tabs 40 and 49 of the master file (referenced in Appendix C of this decision) for this consolidated group.

³² It need hardly be observed that any time a President exercises his pardon authority it could conceivably "strip" another duly-empowered official of his authority, such as occurred when appropriate law enforcement officials were precluded from prosecuting President Nixon following the issuance of President Ford's pardon or when they were precluded from prosecuting draft evaders pardoned by President Carter.

³³ Although appellants argue on appeal that their petitions of appeal should not be used for this purpose, I find that petitions of appeal (while they do not constitute

evidence) may be considered insofar as declarations against interest are made therein. See *Pelham v. Department of Treasury*, MSPB Order No. DA075209140 (December 4, 1981).

³⁴ The agency argues on appeal that many of the appellants in this facility waived their right to claim that they had less than 7 days to reply to the proposed notice since they did not specifically request an extension of time to make an oral reply (as they did, in a form letter, for purposes of their written replies), and because at many of the facilities in this consolidation, the PATCO representatives mutually agreed with the facility chief on the dates of the orals for particular appellants. Although the record evidence presents an arguable basis for the agency's waiver claim, I do not make specific findings on this issue in view of my finding *infra* that those appellants who replied with 7 days have failed to make any showing of harmful error.

³⁵ It should be noted that even where I have found that employees were given less than 7 days to give an oral reply to the letter of intent, this record indicates that many of these employees were not denied a 7-day reply time for the submission of a written reply. This fact, as well as other factors which are noted *infra*, is relevant to the degree of harm suffered as a result of the agency's actions - assuming that the harmful error standard may be applied.

³⁶ In the pertinent Senate committee summary of the Civil Service Reform Act (Senate Bill 2640), committee chairman Ribicoff noted that "Henceforth (following Bill 2640), the Board and the courts should only reverse agency actions under the new procedures where the employee's rights under this title have been substantially impaired." He further stated that "...the bill changes the applicable standards to avoid unnecessary reversals of agency actions be-

cause of technical procedural oversights...." S. Rep. No. 969, 95th Cong., 2d Sess. 51, 54, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 2773, 2776. The relevant House report states, in pertinent part, "...in an appeal, the decision of the agency must be sustained by MSPB unless the employee shows an error in procedure which substantially impairs his or her rights...." H. R. Rep. No. 1403, 95th Cong., 2d Sess. 108 (1978). In making these determinations, Congress took note of the testimony before congressional committees that the former agency in charge of handling government appeals often reversed adverse actions based on non-substantial procedural grounds. See e.g., Civil Service Reform: Hearings before the House Committee on Post Office and Civil Service on H. R. 11280, 95th Cong., 2d Sess. 31, 122-123 (1978). I note parenthetically that although counsel argues on appeal that the Senate version of the Act was later defeated by vote in Congress, the record merely reflects that the acting conference committee, which resolved the differences between the House and Senate versions of the Act, combined the findings and purposes of both bills. See H.R. Rep. No. 1717, 95th Cong., 2d Sess. 127 (Comm. of Conference), reprinted in 1978 U. S. CODE CONG. & AD. NEWS 2860. In any event, the important point here is that both Houses of Congress stated their intent to not permit (on mere technical grounds) the reversal of substantively valid adverse actions.

³⁷ Further evidence of the intent of Congress in this respect can be seen from a review of pertinent congressional comments concerning the genesis of, and the need for, reform of the old civil service system. The Senate Committee on Governmental Affairs, for example, spoke of the need to "allow civil servants to be able to be hired and fired more easily..." S. Rep. No. 969, 95th Cong., 2d Sess., reprinted in 1978 U. S. CODE CONG. & AD NEWS 2726. The House

Committee on Post Office and Civil Service stated that "One of the major purposes of (this bill) is to make it easier to remove employees for misconduct, inefficiency, and incompetence." H. R. Rep. No. 1403, 95th Cong., 2d Sess. 108 (1978).

³⁸ I note parenthetically that in the great majority of cases within this consolidated group, appellants merely stood mute on the record and failed to make any substantive comments on the proposed actions. In view of this failure to comment on the proposed actions at the oral reply, the simplicity of the charges in these cases, and the seemingly short preparation time which would have been necessary for appellants to explain why they failed to appear for their deadline shifts, I have been unable to discern, within this consolidated group, that any appellant was harmed by the failure to have 7 full days to respond to the letter of intent.

³⁹ Some employees (who called the facility) did have oral responses. (TR: Vol. 16, p. 156)

⁴⁰ The fact that substantive comments made at the oral reply were considered by Mr. Gunter is demonstrated by the fact that 8 controllers were restored to work following their orals.

⁴¹ In view of counsel's failure to further define any allegations of harmful error which may have occurred in individual cases, I am unable to make any further findings on this issue.

⁴² 5 U.S.C. 7512 defines a suspension appealable to the Board as one which is more than 14 days in length. For purposes of this consolidation, appellants' counsel admits, in his final statement of facts and issues, that some appellants were suspended for 14 days or less, but he has failed to identify who those appellants are. Although he asserts that all appellants (even those unidentified individuals who were

suspended for less than 14 days) should have their appeals entertained by the Board under - if necessary - a pendent jurisdiction rationale, I find no legal basis for this argument and conclude, based on the unequivocal language of the relevant statute, that those appellants who were placed in a non-duty status for 14 days or less prior to their termination have no possible right of appeal to the Board from that action.

⁴³ Under a series of Board decisions, the principle one being *Alonzo v. Department of the Air Force*, 4 MSPB 262 (1980), an appeal filed outside the 20-day time limit may be accepted (particularly if the employee was not - as is the case here - notified of any possible right of appeal from the action) if the employee exercises due diligence from the time he discovers his right to appeal. Since appellants' counsel was well aware of this possible right of appeal no later than March 4, 1981, appellants who wished to pursue an appeal right from the "suspension" actions should arguably have exercised due diligence from that time forward and properly filed an appeal.

⁴⁴ The importance of the requirement for appellants to notate the dates of the alleged suspension actions is clearly apparent from his record since those appellants who were placed in a non-duty status for 14 days or less have no right of appeal to the Board. In view of appellants' failure to specify such information, it is arguable that, for this reason alone, they have failed to fulfill their burden.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

CHARLES F. BEHENSKY, JR., et al.,¹

appellant,

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,

agency.

DOCKET NUMBER
CH075281F0979

OPINION AND ORDER

The appellants have petitioned for review of the initial decision dated February 15, 1983, sustaining their removal from the positions of Air Traffic Control Specialist at the Chicago Air Traffic Control Center in Aurora, Illinois (ZAU). The Federal Aviation Administration based its removal actions on charges of participating in a strike against the United States Government in violation of 5 U.S.C. § 7311 and 18 U.S.C. § 1918 and unauthorized absence (AWOL).

The petition for review presents a significant problem concerning the probative value of the agency's documentary evidence introduced at the consolidated hearing to sustain the removal of the seventy-two ZAU controllers. The appellants argue that the presiding official erred by according credibility to the agency's documents, despite the appellants' substantial impeachment of their reliability, and that all

1) The appellants listed in Appendix A were all formerly employed at the Chicago Center and represented by the same counsel. Their cases were consolidated with appeals from other FAA facilities within the Chicago Regional Office's jurisdiction. Appeals originating from facilities other than the Chicago Center will be disposed of in a separate Opinion and Order.

ZAU cases should be reversed on the grounds that the agency failed to prove each appellant's strike participation by a preponderance of credible evidence. Petition for Review at 19-22. The agency argues that the documentation contained in each individual appeal was sufficient, when considered with the testimony presented by the agency, to support each removal, and that the presiding official was correct in according the agency's documents credibility.

The consolidation in this case consisted of 451 controllers that were employed at 38 agency facilities in the jurisdiction of the Board's Chicago Regional Office and represented by the law firm of Leighton, Conklin, Lemov, Jacobs & Buckley. The agency's case in chief primarily consisted of introducing the adverse action file for each individual into evidence and the testimony of facility chief George H. Gunter concerning general issues such as the existence of picketers, length of the strike, explanation of records, establishment of deadline shifts, and the employee reply process. More importantly, Gunter could not testify to the facts concerning each individual's participation in the strike based on personal knowledge and instead had to rely on the contents of each adverse action file as a contemporaneous business record of the events. See, e.g., Transcript (TR.) I at 64, TR. III at 87, 101-102. In order to expedite the proceedings by eliminating repetitious testimony from Gunter regarding the contents of the files, the parties stipulated to the contents, but not the accuracy of the adverse action files. TR. I at 79-81. In most instances the agency did not present additional evidence bearing on the issue of an individual's participation in the strike. See, e.g., TR. I, p. 96. Therefore, the contents of the files in this case are central to the agency's ability to sustain the burden of proving an individual's strike participation under *Schapansky v. Department of Transportation*, MSPB Docket No. DA075281F1130 (October 28, 1982).

Three documents in each file are of central importance to proving strike participation and AWOL. They are the watch schedules, personnel sign-in logs, and time and attendance records (T&A records). Gunter testified that he relied on these records in making the determination of whether or not an individual was a striker. TR. I at 64-66, 74. The watch schedules were the first documents generated, being prepared a minimum of three weeks in advance. TR. I at 71-72. A portion of the schedule for the alleged period of strike participation and AWOL was placed in each employee's adverse action file. See Skeleton Files at Tab 5. For each work area at the facility, supervisors would write in names of assigned employees on personnel sign-in logs the night or day before a shift so employees could indicate their presence at the shift assigned to them according to the watch schedules. TR. I at 100. Ordinarily, T&A records were compiled at a later date for pay purposes based on the watch schedules and sign-in logs. TR. I at 64, 85. Since the watch schedule was the only document that indicated a work assignment, it was the only document at the facility from which a supervisor could verify that an absent employee was assigned to a duty shift. TR. I at 87.

Gunter admitted under cross-examination that he did not verify the accuracy of the information contained in the adverse action files, TR. II at 76, but he later contradicted himself concerning verification. TR. II at 78. He also admitted that inexperienced clerks could have made mistakes in reading watch schedules, TR. II at 89, since the normal agency procedure in filling out personnel logs was not followed due to the unusually high absentee rate. TR. I at 112-114 and TR. III at 111-112. Appellants discovered during the course of the hearing numerous alterations and inconsistencies in the agency's documentation. See, e.g., TR. I at 101-120; TR. VI at 86. Gunter testified that personnel clerks filled in names

on sign-in logs to reflect absent controllers during the strike period after the fact. TR. III at 111-112. He had no direct knowledge of how the alterations were accomplished. TR. VI at 81.²

The agency admitted through counsel that the agency had altered the logs to reflect actual absenteeism. TR. VI at 81. Discussion concerning alterations of documents by the agency then focused upon the personnel sign-in logs. Appellants objected to the authenticity of the logs in the adverse action files and requested that they be provided with copies of the originals for August 3 through 8, 1981. TR. III at 116-118. The documents produced by the agency were admitted into evidence as Appellants' Exhibit 16. TR. IV at 3-4. (There are two Volume IVs, please refer to Volume IV dated November 4, 1982 beginning at 8:49 a.m.) Paradoxically, the agency never conceded the authenticity of the sign-in logs admitted as Appellants' Exhibit 16. TR. IV at 85. The presiding official appreciated the import of appellants' attack on the reliability of the agency's documentation. He requested that the agency introduce additional evidence regarding the alterations and the reasons for making them in order to rehabilitate the documentary evidence. TR. VI at 82, 88. The agency then offered to call a Mr. Miller. The appellants strenuously objected to Mr. Miller being called as a witness as he had not been sequestered during testimony concerning the logs. TR. VI at 80. The presiding official upheld the appellants' objection to Mr. Miller, but the agency failed to offer any other testimony in rebuttal even though the presiding official gave it the opportunity to do so. TR. VI at 89.

- 2) Gunter contradicted himself a second time when he was asked if he knew of anyone at the facility who had changed the documentation in order to support the removals. Compare TR. I at 100 with 113-114.

We conclude that the presiding official did not err in admitting the agency's attendance and pay records into evidence. Despite the fact that the records are in some instances incomplete, inconsistent, and contain alterations and succeeding entries, the agency established through the testimony of facility chief Gunter that they were regularly created in conjunction with the operation of ZAU and they were relied upon in managing its work force. See *United States v. Foster*, 711 F.2d 871, 882 (9th Cir. 1983); *United States v. McPartland*, 595 F.2d 1321, 1348-1349 (10th Cir. 1979); *Peter Kewit Sons Co. v. Summit Construction Co.*, 422 F.2d 242, 268 (8th Cir. 1969). However, as our decision in *Borninkhof v. Department of Justice*, 5 MSPB 150 (1981) suggests, what probative value to ascribe the admitted documents is a question to be answered by analyzing their quality. The facet of quality we are scrutinizing in this case is reliability. Reliability may be found by examining the circumstances of the document's creation to see if there is an inherent probability of trustworthiness. *Uitts v. General Motors Corp.*, 411 F. Supp. 1380, 1382 (E.D. Pa. 1974) aff'd, 513 F.2d 626 (3rd Cir. 1975). As the trier of fact, the Board has broad discretion in making this determination. See also *Crompton-Richmond Co., Inc. v. Briggs*, 560 F.2d 1195, 1201 n.12 (5th Cir. 1977); *United States v. Evan*, 572 F.2d 455, 490 (5th Cir. 1978), cert. denied, 439 U.S. 870 (1978).

In *Borninkhof*, supra, at 156-157 we listed eight factors to be considered in assessing the reliability of written hearsay. We add that the extent of the identifying witness' personal knowledge, if any, of the records' preparation should be considered. *Calhoun v. Baylor*, 646 F.2d 1158, 1162 (6th Cir. 1981); *United States v. Rosenstein*, 474 F.2d 705, 710 (2nd Cir. 1973); *United States v. Page*, 544 F.2d 982, 986-987 (8th Cir. 1976). Also to be considered is when the documents were prepared, since reasonably contemporaneous entries or

documents help to insure reliability, e.g., *United States v. Kim*, 595 F.2d 755, 760 (D.C. Cir. 1979); *Seattle-First National Bank v. Randall*, 532 F.2d 1291, 1296 (9th Cir. 1976); *Gilmour v. Strescon Industries, Inc.*, 66 F.R.D. 146, 150 (E.D. Pa. 1975), aff'd, 521 F.2d 1398 (3rd Cir. 1975), and whether the records are complete. *United States v. Weiner*, 578 F.2d 757, 792, cert. denied, 439 U.S. 981 (1978).

Here, the appellants have demonstrated that the agency did not in every case create the records in question in the usual course of business, but under unusual circumstances and with some inaccuracy. A majority of the ZAU appeals, however, may contain records consistent enough to conclude that more likely than not an individual was striking and AWOL on at least one of the days charged. See Schapansky, supra. Consequently, this case is remanded to the presiding official for further adjudication consistent with this Opinion and Order. On remand, the presiding official may wish to consider the need for eyewitness testimony explaining the process by which the records were created. If the written record is to speak for itself we must be sure that it is accurate.

Therefore, the petition for review is GRANTED, the initial decision VACATED, and the case REMANDED to the Chicago Regional Office.

FOR THE BOARD:

February 8, 1984

Kathy W. Semone for
Robert E. Taylor, *Secretary*

Washington, D. C.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
CHICAGO REGIONAL OFFICE

CHARLES F. BEHENSKY, JR., et al.¹

v.

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

CASE NUMBER
CH075281F0979REM

DATE: December 17, 1984

INTRODUCTION

By Opinion and Order dated February 8, 1984, the Board remanded this case for further adjudication. The Board specifically directed further analysis of the agency's documentary evidence and a new determination as to the reliability and accuracy of the agency's records. A hearing on the remanded issue was held on August 20-31, 1984 in Chicago, Illinois.

ANALYSIS AND FINDINGS

The general facts surrounding the 1981 nationwide air traffic controllers strike are fully described in *Schapansky v. Department of Transportation*, MSPB Docket No. DA075281F1130 (October 28, 1982), *aff'd*, 735 F.2d 477 (Fed. Cir. 1984), cert. denied, 53 U.S.L.W. 3365 (Nov. 13,

1) See Appendix

1984). In addition, the facts and circumstances relating to the Chicago Center (ZAU), where the appellants in the instant case were employed, are set forth in my Initial Decision dated January 18, 1983, and the Board's February 8, 1984 Opinion and Order.

In *Schapansky*, *supra* the Board and the Court held that the agency could establish a prima facie case of strike participation by showing that an employee was absent without authorization during the period of the strike. Hearsay evidence may be sufficient to establish such a prima facie case. *Campbell v. Department of Transportation*, MSPB Docket No. DE075281F0674 (April 25, 1983) *aff'd* 735 F.2d 497 (Fed. Cir. 1984), *cert. denied*, 53 U.S.L.W. 3269 (Oct. 9, 1984). In *Borninkhof v. Department of Justice*, 5 MSPB 150 (1981), the Board set forth various principles and factors to be considered in the evaluation of hearsay evidence.

In remanding the instant case, the Board stated its concern regarding the agency's documentary evidence, noting several apparent alterations and inconsistencies in the agency's records. Following an analysis and application of the *Borninkhof* factors, the Board determined that further inquiry was necessary to ascertain the reliability of the agency's records. The Board specifically noted that such inquiry could include an examination of the circumstances surrounding the creation of the documents at issue. *Behensky, et al. v. Department of Transportation*, MSPB Docket No. CH075281F0979 (February 8, 1984) at 6.

The documents in question are the watch schedules, the sign-in logs (304's) and the time and attendance (T & A) reports. A watch schedule shows an employee's shift assignments for a one-week period and was normally posted three to four weeks in advance. A sign-in log is a document normally prepared one day in advance, and shows the names of

employees assigned to a particular shift, as per the watch schedule. As employees report for duty, they are to sign and initial next to their names to indicate their presence. A T & A report is an administrative document, used to note an employee's attendance, pay and leave for a two-week pay period, and is prepared through a review of applicable watch schedules and sign-in logs.

At the remand hearing, the agency presented the testimony of Mr. Robert Miller who, at the time of the strike, was the Facility Evaluations Officer for ZAU. Mr. Miller testified over a period of several days as to the practices and procedures regarding the preparation and use of the documents, including the operation of the "war room", a central work area set up during the second week of the strike to deal with administrative paperwork. The agency also presented the testimony of several area supervisors regarding the preparation and use of the documents in general, and specific identification of sign-in logs prepared by them. The agency also presented testimony from individuals who had been involved in the "war room" activities at various time.

None of the appellants in this case testified at the remand hearing. Appellants' representative cross-examined the agency's witnesses and introduced various exhibits.² The representatives essentially attempted to attack the reliability

2) The cases involving appellants represented by Richard J. Leighton were partially severed from this consolidation. Following the conclusion of Mr. Leighton's presentation, Messrs. Klein and Wood presented further evidence on behalf of their clients. However, this technical severance has no effect upon the findings and conclusions in this decision and requires no further discussion.

of the agency's documentary evidence and the credibility of Mr. Miller and Mr. Richard Shewfelt, Manager of the Labor Relations Branch for FAA's Great Lakes Region.³

With respect to the watch schedules, appellants point to numerous differences between the original schedules (Appellants' Group Ex. 8) and the copies of said schedules contained in individual adverse action files. Mr. Miller testified that said differences were due to the fact that the copies in the adverse action files were made while the schedules were still operational, and that subsequent changes on the original schedules were made while "working" controllers were handling the increased workload occasioned by the strike. Indeed, a close examination of the documents reveals that no changes were made to any appellant's scheduled shifts during the applicable period.⁴ Mr. Miller testified that he made notations on the watch schedules of two appellants (DeJong and Reedy) but that said notations did not change their assigned shifts, and the record bears this out.

Mr. Miller and the other supervisors testified as to the procedures for posting and amending watch schedules. Based upon their testimony, and the consistency of the documents as they pertain to the appellants, I find that the watch schedules are reliable and, in the absence of a specific chal-

3) Appellants moved for the imposition of sanctions against the agency based upon alleged misrepresentation, fraud and forgery. In light of my analysis and findings *infra*, said motion is hereby denied. *Swenson v. Office of Personnel Management*, 7 MSPB 565 (1981); *Butler v. Smithsonian Institution*, 9 MSPB 843 (1982).

4) The period beginning with August 3, 1981 and continuing through the date of each appellant's "deadline" shift (the first scheduled shift after 11:00 a.m. on August 5, 1981).

lence by any appellant, accurately reflect appellants' shift assignments during the period in question.⁵

Regarding the sign-in logs, appellants point to differences between the original logs, (Appellants' Joint Ex. 9) and the copies contained in the adverse action files. However, during the applicable period, such differences appear with respect to only three of the appellants (Nelson, Lockhart and Schultz). In each of these cases, the appellant's name had been added to a sign-in log by a person working in the "war room". Mr. Miller testified that this was done because the employee's name had been inadvertently omitted from the sign-in log for a shift to which he was assigned as per the watch schedule.

Mr. Miller, and the area supervisors, testified that it was not uncommon that a person's name would not appear on the sign-in log for a particular shift. In such an instance, when the controller reported for work and discovered that his name was not on the log, the supervisor would add the employee's name to the log, and the employee would sign in. Obviously, if the employee did not appear for an assigned shift, the omission of his name from the log might not be discovered for some time.

As previously noted the watch schedule is the official document which determines an employee's assigned shift. In this regard, the presence or absence of an employee's name on a sign-in log is not nearly as significant as the presence or absence of the employee's signature on the document. The witnesses consistently testified that no signatures were erased from any sign-in logs. Moreover, none of the appellants has alleged that he did appear on the dates in question.

5) Appellants, Morris, Logerquist and Kish did not have posted watch schedules. However, the record contains testimony and or statements from their supervisors describing their shift assignments.

(Nelson and Lockhart - August 7, 1981; Schultz - August 3 & 5, 1981). I therefore find that these three appellants were not prejudiced by the agency's unusual, albeit unnecessary, addition of their names to the logs.

As to the sign-in logs in general, the area supervisors verified the authenticity of the applicable logs for the vast majority of the appellants in this consolidation. Based upon their testimony regarding the preparation and use of the logs, and my own examination of all of the logs for the applicable period, I find an "inherent probability of trustworthiness". *Behensky, supra* at 6.

With respect to the T & A's, the record reflects that amended reports were prepared during, and for months after, the period of strike. However, the vast majority of the amendments dealt with pay periods subsequent to an employee's deadline shift, and are essentially irrelevant. As to amendments dealing with dates during the applicable period, and T & A amendments in general, such changes are common in the Federal sector. Moreover, in light of my findings above regarding the watch schedules and sign-in logs, the T & A's appropriately reflected each appellant's status during the applicable period.

I am not persuaded by appellants' arguments concerning the credibility of Messrs. Miller and Shewfelt, and the alleged forgery, fraud and misrepresentations on the part of the agency. I find no persuasive evidence that any agency official perjured himself, attempted to "make" or "rig" a case against an appellant, or otherwise committed an act which might be considered fraudulent. In some measure, the agency's records were not created in the ordinary course of business. However, during the summer and fall of 1981, agency "business" was far from "ordinary". Given the totality

of circumstances, and in light of my findings above, I find that the agency's documentary evidence is, in fact, reliable.

In summary, I have carefully reviewed the record and have determined that each of the appellants in this consolidated group was absent without authorization on one or more days during the strike, and that each failed to report for his/her "deadling shift". Accordingly, I find that the agency has established a prima facie case of strike participation with respect to each appellant. In light of this finding, the burden of persuasion now shifts to each appellant to show that he or she was unaware of the strike, or that his/her absence was not due to intentional strike participation. *Schapansky*, 735 F.2d at 482.

In my first Initial Decision dated January 18, 1983, I addressed in detail the individual rebuttals presented by certain appellants in this consolidated group.⁶ With respect to appellant Patrick Lydon, evidence received during the remand hearing warrants further discussion of his case, as set forth infra. However, I find no reason to substantially alter my prior findings with respect to the remaining individuals, and I hereby adopt and incorporate herein said prior findings.

As to Mr. Lydon, his former supervisor testified that under normal circumstances (prior to the strike) an employee could be granted emergency annual leave for more than one day, if the situation warranted it. (Remand Hearing TR. p. 887) This testimony does not alter the fact that appellant was granted such leave for only one date, July 31, 1981. However, it does tend to support appellant's position that his failure to

6) Appellants Brandis, Broholm, Burgard, Carlson, Ellis, Holic, Kemphues-Eden, Kish, Logerquist, Lydon, Moses, Peacock, Piorkowski, Popowitch, Price, Radnoff, Rasmussen, Reedy, Rudd, Schuemann, Taggart, and Toepfer.

report to work on and after August 3, 1981 was based upon his belief that he had been granted emergency annual leave indefinitely during the duration of his "emergency" (the premature birth and subsequent treatment of his son).

Notwithstanding the above "support" for appellant's position, my review of the total available evidence leads me to again reject said position. Although allegedly unable to come to work due to an "emergency" situation, appellant found time to visit union headquarters during the first week of the strike and to stand on the picket line soon after his deadline date. Moreover, a reasonable person, upon receipt of a proposal notice dealing with a period of time during which he believed himself to have been in an approved-leave status, would immediately contact the agency to point out its obvious error. However, Mr. Lydon did not do this. In fact, he did not raise this "obvious" defense in his written and oral replies to the proposal notice, nor in his petition for appeal to the Board. Under the circumstances, Mr. Lydon's stated reason for his absences is not worthy of belief. *Anderson v. Department of Transportation*, MSPB Docket No. SL075281F0347 (April 25, 1983), aff'd 735 F.2d 537 (Fed. Cir. 1984), cert. denied, 53 U.S.L.W. 3365 (Nov. 13, 1984).

I find that the agency has established a prima facie case of strike participation with respect to each appellant, and that none of them has presented persuasive evidence in rebuttal. The same evidence supports the charges of absence without leave. *Schapansky*, 735 F.2d at 484. I therefore find that the charges are supported by a preponderance of the evidence, and they are hereby sustained.

Appellants raised numerous defenses and issues which have been addressed by both the Board and the Courts. Appellants' positions with respect to these matters have been consistently rejected, as follows:

1. The agency properly invoked the "crime provision" to reduce the notice period to seven days. See Schapansky, 735 F.2d 477 at 486;
2. There was no disparate treatment of appellants as compared to controllers who returned to work prior to their deadline shift. See Schapansky at 485;
3. There was no improper "command control" exercised by the President or agency officials. See Schapansky at 486-87; DiMasso v. Department of Transportation, FAA, 735 F.2d 526 at 528 (Fed. Cir. 1984);
4. Appellants were afforded an adequate period of time within which to reply to the agency's charges, and the agency committed no harmful error in this regard. See Adams v. Department of Transportation, FAA, 735 F.2d 488 at n. 3 (Fed. Cir. 1984);
5. The agency committed no harmful error with respect to appellants' oral replies, and appellants had a fair opportunity to present evidence rebutting the charges, had they chosen to do so. See DiMasso at 528;
6. Appellants were not constructively suspended during the notice period. See Adams at 492-93.

In Shapansky, 735 F.2d at 484, the Court stated that the penalty of removal "under such circumstances was clearly justified, and the nexus between removal and efficiency of the service is clear." Accordingly, I find that the agency's penalty selections regarding these appellants were both reasonable and appropriate. Douglas v. Veterans Administration, 5 MSPB 313 (1981).

DECISION

The agency's actions are hereby **AFFIRMED**.

NOTICE

This is an initial decision and will become a final decision of the Merit Systems Protection Board on January 21, 1985, unless a petition for review is filed with the Board.

Any petition for review must be filed with the Board within thirty-five (35) calendar days after the issuance of this decision.

Any party to this appeal, the Director of the Office of Personnel Management (OPM) and the Special Counsel may file a petition for review of this decision with the Merit Systems Protection Board. The Director may request review only if he or she is of the opinion that the decision is erroneous and will have a substantial impact on any civil service law, rule or regulation under the jurisdiction of OPM. 5 U.S.C. § 7701(e)(2). The petition must identify specifically the exception taken to this decision, cite the basis for the exception, and refer to applicable law, rule, or regulation.

The petition for review must be filed with the Office of the Clerk, Merit Systems Protection Board, 1120 Vermont Ave. N.W., Washington, D.C. 20419 no later than thirty-five (35) calendar days after issuance of this decision. If a petition for review is filed, an original and two copies should be forwarded to the Office of the Clerk.

The Board may grant a petition for review when a party submits written argument and supporting documentation which tends to show that:

1. New and material evidence is available that, despite due diligence, was not available when the record was closed; or
2. The decision of the presiding official is based on an erroneous interpretation of statute or regulation.

Any appellant adversely affected or aggrieved by the Board's final decision may obtain judicial review, if the Court has jurisdiction, by filing a petition with the U.S. Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. Such a petition may not be filed while the case is pending before the Board. To be timely, the petition for judicial review must be received by the Court within 30 days of the final Board decision. 5 U.S.C. § 7703(b)(1).

For the Board:

Stephen E. Manrose
Presiding Official

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UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

CHARLES F. BEHENSKY, JR., et al.,
RICHARD J. BRANDIS, et al.

v.

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

DOCKET NUMBERS
CH075281F0979REM
CH075281F1066

Date: July 5, 1985

BEFORE

Herbert E. Ellingwood, Chairman
Maria L. Johnson, Vice Chair
Dennis M. Deane, Member

1) Although a separate petition for review of the remand initial decision, dated December 17, 1984, was filed by each group of appellants, this case is being consolidated due to the similarity of issues and situations.

The appellants' Motion for Sanctions and to Strike Respondent's Opposition Brief to petition for review is hereby DENIED; and the agency's Motion for Reconsideration is hereby DENIED.

OPINION AND ORDER

INTRODUCTION

This case is before the board on the appellants' petitions for review of the presiding official's remand decision dated December 17, 1984, made pursuant to the Board's instructions for further findings on the creation, reliability and trustworthiness of certain records relied upon by the agency in taking adverse actions against the appellants herein.

BACKGROUND

The appellants previously appealed the agency action removing them from their positions of Air Traffic Control Specialists at the Chicago Air Traffic Control Center in Aurora, Illinois (ZAU) based upon charges of participating in a strike against the United States Government in violation of 5 U.S.C. § 7311 and 18 U.S.C. § 1918, and unauthorized absence (AWOL).

In their original appeals, the appellants argued that the sign-in logs contained in their appeal files contain discrepancies² when compared against the "original" logs (identified as Appellants' Group Exhibit #16); that the agency had

2) An example given of such discrepancy was the changing of an original notation of annual leave (AL) to AWOL.

"doctored" the sign-in logs in the appeal file in order to support the removal actions taken against the appellants (Initial Hearing Transcript (IHT) Vol. I. p. 114); and that no other evidence was presented as to when, if ever, the sign-in logs were changed, who changed them, or for what purpose they were changed.³ Despite the fact that the logs, in some instances, contained alterations and succeeding entries,⁴ the presiding official found in his original initial decision that the agency established, through testimony of George Gunter, Facility Chief, that the logs were created in conjunction with the operations of ZAU and were properly relied upon in managing its work force. See *United States v. Foster*, 711 F.2d 871, 882 (9th Cir. 1983); *United States v. McPartland*, 595 F.2d 1321, 1348-1349 (10th Cir. 1979); *Peter Kewit Sons Co. v. Summit Construction Co.*, 422 F.2d 242, 268 (8th Cir. 1969). He went on to sustain the removal actions taken against the appellants. The appellants petitioned for review.

In its decision on appellants' petition for review of the original initial decision, the Board determined that three documents in each appeal file were of central importance to proving strike participation and AWOL: 1) the watch schedules; 2) the personnel sign-in logs, and 3) the time and attendance records (T&A records). The Board concluded that since the agency did not in every instance prepare these

3) During the initial hearing in these cases, the agency sought to have Mr. Robert Miller, Personnel Management Specialist, testify concerning the apparent changes in the logs. The presiding official sustained an objection by appellants' counsel to Mr. Miller's testimony based upon his previous order that all witnesses, other than the appellants, be sequestered during the hearing. Mr. Miller had been present during the hearing as a technical advisor to the agency. IHT Vol. VI, pp. 79, 80, 83. The presiding official also sustained appellants' objections to permitting the record to remain open for additional agency witnesses, other than Mr. Miller, to testify concerning this issue.

4) The agency admitted to counsel that the agency had updated the logs to reflect actual absenteeism. IHT VI, at 81.

records in the usual course of business, but rather under unusual circumstances and with some inaccuracies, further evidence and analysis were necessary to determine whether the records were sufficiently reliable to establish strike participation by the appellants. The case was, therefore, remanded to the presiding official for further adjudication with a suggestion that he consider the need for eyewitness testimony explaining the process by which the records were created.

INITIAL DECISION AFTER REMAND

At the remand hearing, the agency presented lengthy testimony of Robert Miller, who was the Facility Evaluations Officer for ZAU at the time of the strike. Over a period of several days, Mr. Miller testified as to the practices and procedures followed in the preparation and use of the documents in issue. He also described the operation of the data collection center, commonly referred to as the "war room", a control work area set up during the second week of the strike to deal with administrative paperwork associated with the removal actions, oral replies, and the initial hearing. Remand Hearing Transcript (RHT) at 110-111.

Mr. Miller also testified concerning the differences between the documents contained in the appeal files and those submitted by appellants. He stated that any differences between the two sets of schedules were due to the fact that the copies in the adverse action files were made while the schedules were still operational, and that subsequent changes on the original schedules were made while "working" controllers were handling the increased workload occasioned by the strike. None of the appellants testified at the hearing, nor did they specifically state, either orally or in writing, that they were in fact either on duty or on approved leave or not scheduled to work at the time(s) the documents

indicated they were absent. The presiding official found that a close examination of the documents reveals that no changes had been made to any appellant's scheduled shifts during the applicable period.⁵ Based upon the further testimony of Mr. Miller and the other facility supervisors⁶ regarding the procedures for posting and amending the watch schedules (RHT, 119), and the consistency of the documents, the presiding official concluded that the watch schedules were reliable, and, in the absence of any specific challenge by any of the appellants, accurately reflected the shift assignments for the appellants during the period in question.

With regard to the sign-in logs, appellants pointed to differences between the original logs (Appellants' Joint Ex. 9) and the copies contained in the adverse action files. The presiding official found that during the applicable period, however, such differences appeared with respect to only three of the appellants, Nelson, Lockhart and Schultz. RHT at 78. In each of these instances, the appellant's name had been added to a sign-in log by an employee working in the data collection center. This was done because the employee's name had been inadvertently omitted from the sign-in log for a shift to which he was assigned under the watch schedule. Remand Initial Decision (RID) at 5. The presiding official concluded that the presence or absence of

5) This is the period beginning with August 3, 1981 and continuing through the date of each appellant's "deadline" shift (the first scheduled shift after 11:00 a.m. on August 5, 1985).

6) The agency also presented the testimony of several area supervisors who testified regarding the preparation and use of the documents in general, and specifically identified the sign-in logs prepared by them.

an employee's name on a sign-in log, whether subsequently added or not, was not as significant as the presence or absence of the employee's signature on the document. He therefore found that inasmuch as none of the appellants' signatures appeared on the sign-in logs, the agency's addition of their names to the logs (obviously to show that the appellants were, at best, scheduled to work)⁷ did not prejudice these appellants. The presiding official also found based upon testimony by the supervisors and his own examination, that an "inherent probability of trustworthiness" existed in these logs. RID at 5.

With regard to the T&A's, the record revealed that the vast majority of the amendments to those reports were in reference to the pay periods subsequent to an appellant's deadline shift. As the presiding official found, such changes are essentially irrelevant. RID at 5. As to the reports which covered the applicable period (August 3-5 1981), the presiding official concluded that such changes, and T&A amendments in general, are not uncommon in the Federal sector and that the amended T&A reports accurately reflected each appellant's status during the applicable period. RID at 5. He also found no evidence of fraud, forgery or misrepresentations on the part of the agency, nor any persuasive evidence that any agency official perjured himself, attempted to "make" or "rig" a case against an appellant, or otherwise committed any act which might be considered fraudulent. RID at 6. Given the totality of circumstances, the presiding official concluded that the agency's documentary evidence was,

7) Mr. Miller stated that the most common "mistakes" on sign-in logs were created by shift swaps when an entire crew on a watch schedule is listed on one shift and a controller changes off that shift. Therefore, when putting down names from the watch schedule to the sign-in logs one might miss the shift swap of an individual and inadvertently list him on the wrong shift "that was a common mistake." RHT 124-125.

in fact, reliable; that each of the appellants was absent without authorization (AWOL) on one or more days during the strike; that each appellant failed to report for his/her deadline shift; that the agency established a prima facie case of strike participation with respect to each appellant; and that none of the appellants presented persuasive evidence to rebut the agency's prima facie case. The presiding official, therefore, held that the charges against the appellants were supported by the preponderance of the evidence, and sustained each appellant's removal. RID at 8.

PETITION FOR REVIEW OF REMAND INITIAL DECISION

The appellants have now filed timely petitions for review of the presiding official's remand initial decision. They contend, inter alia, that the presiding official erred in permitting Mr. Miller to testify at the remand hearing as to the circumstances surrounding the creation of the agency documents since he had previously, at the initial hearing, denied the agency request to call him as a witness because he had not been sequestered as were other witnesses, and that the presiding official's decision permitting him to testify was, therefore, a violation of Rule 615 of the Federal Rules of Evidence. Appellants also contend that the agency destroyed the original watch schedules and swap books; that the presiding official erred in his credibility assessment of agency witnesses; and that the presiding official was biased and prejudiced. These contentions are without merit.

In reference to appellants' contention that the presiding official erred in permitting Mr. Miller to testify at the remand hearing, the record reveals that the presiding official allowed Miller to testify because: (1) the agency's failure to sequester him did not constitute a willful or intentional violation of the sequestration order; (2) under the third ex-

ception of Rule 615 of the Federal Rules of Evidence, Miller was "a person whose presence is shown by a party to be essential to the presentation of his case"; and (3) there was not a likelihood that Miller's testimony would be shaped in a manner prejudicial to the appellants by virtue of his having heard the testimony of the other witnesses. (Notice of Hearing and Order, Remand File, Tab 19.) The Board finds the presiding official's stated reasons to be reasonable and can discern no error or abuse of discretion on the part of the presiding official in this regard. Appellants allege, in essence, that since the presiding official ordered the witnesses at the first hearing sequestered and Mr. Miller remained in the hearing room during the proceedings, he should not have been permitted to testify at the remand hearing.⁸ Since strict adherence to the Federal Rules of Evidence is not mandatory in administrative proceedings, this contention must also be rejected. See, e.g., Davies v. Department of Agriculture, 5 MSPB 291 (1981). A perusal of the specific language of Rule 615 makes it clear, however, that even under a strict application of the rules of evidence, the exclusionary rule does not authorize the exclusion of a person whose presence is shown by a party to be essential to the presentation of his case. In re United States, 584 F.2d 666 (5th Cir. 1978). A review of the record in this case discloses that Mr. Miller's presence in the hearing would have been appropriate under this exception.

Additionally, in a case somewhat similar to the instant case, the United States Court of Appeals for the Fifth Circuit concluded that the district court did not err when it permitted the government to use a postal inspector as its final witness after he had been permitted to remain in the

8) At the initial hearing the presiding official excluded Mr. Miller's testimony, but on remand, permitted Mr. Miller to testify.

courtroom to assist the prosecutor during the testimony of other witnesses. The court opined that the district court did not abuse its discretion in permitting the inspector's testimony which principally related to matters peculiarly within his personal knowledge. *United States v. Nix*, 601 F.2d 214 (5th Cir. 1979).

It was, therefore, appropriate for the presiding official, in order to assess the reliability of agency records, to determine that eyewitness testimony was required to further explain the process by which those records were created. Notwithstanding the fact that Mr. Miller, who was the agency's technical representative, remained in the hearing subsequent to a sequestration order at the initial hearing, the presiding official determined, over appellants' objections, that since Mr. Miller was in charge of the data collection center where the administrative paperwork was processed, he had firsthand knowledge of the entire recordkeeping process and that his testimony at the remand hearing was essential. The presiding official's decision to permit Mr. Miller to testify under these circumstances, despite his prior sequestration order, was not an abuse of discretion. *United States v. Bobo*, 586 F.2d 355 (5th Cir. 1978); *United States v. Johnston*, 578 F.2d 1352 (10th Cir. 1978).

As to appellants' contention that the agency destroyed the original watch schedules and swap books, the presiding official evaluated documents, weighed their probative value, and determined that any subsequent changes on the watch schedules contained in the adverse action files were made while working controllers were handling the increased workload occasioned by the strike. The presiding official found the documents reliable and an accurate reflection of appellants' shift assignments during the period in issue. *Borninkhof v. Department of Justice*, 5 MSPB 150 (1981). In any event, a close examination of these documents reveals that

no changes were made to any appellant's schedules shifts during the applicable period of August 3, 1981 through August 5, 1981. The Board finds no error in the presiding official's evaluation of the reliability of these documents.⁹

The appellants have also raised specific arguments regarding the removals of appellants Peacock and Reedy. These arguments were considered and adequately addressed by the presiding official in his original initial decision. These arguments represent mere disagreement with the presiding official's finding of fact. Since we find no error in the presiding official's reasoning with regard to these issues, we decline to disturb his findings. See *Weaver v. Department of the Navy*, 2 MSPB 297 (1980); see also *Anderson v. Department of Transportation*, MSPB Docket No. SL075281F0347 (April 25, 1983) aff'd, 735 F.2d 537 (Fed. Cir. 1984) (employee's obligation to contact the agency for clarification when confused about returning to work); *Martel v. Department of Transportation*, MSPB Docket No. BN075281F0558 (April 25, 1983) aff'd, 735 F.2d 504 (Fed. Cir. 1984) (employee must prove that he was "ready, willing and able" to report for duty and had so advised the agency).

As to the remaining matters raised by appellants in their petitions for review, the Board has previously resolved those issues in: *Stone v. Office of Personnel Management*, 5 MSPB 142-43 (1981) (ruling on motions and the imposition of sanctions is a matter for the presiding official's sound discretion); *Karapinka v. Department of Energy*, 6 MSPB 114, 115-16 (1981) (procedural error by a presiding official); *Prime v.*

9) As the Board has previously noted, while the "best evidence" rule has some applicability in Board proceedings, the real issue is whether the record contains adequate, competent and reliable evidence to support the agency's charges. See e.g. *Jones v. Department of Agriculture*, MSPB Docket No. CH07528110391 (January 23, 1984); *Natividad v. Department of Agriculture*, 5 MSPB 426 (1981).

U.S. Postal Service, 5 MSPB 110 (1981) (the mere fact that a presiding official does not rule on motions or accept the assertions of an appellant in the fashion an appellant would desire does not constitute bias, prejudice or impropriety); *Weaver v. Department of the Navy*, supra. (due deference is accorded to the presiding official's factual and credibility assessment of witnesses); *Book v. U.S. Postal Service*, 6 MSPB 322 (1981), aff'd. 675 F.2d 158 (8th Cir. 1982) (a presiding official is not precluded from drawing adverse inferences when an appellant refuses to testify in response to probative evidence against him); *Desiderio v. Department of the Navy*, 4 MSPB 171 (1980) (AWOL alone is cause for removal); *Schapansky v. Department of Transportation*, 12 MSPB 141 (1982) aff'd. 735 F.2d 477 (Fed. Cir. 1984) (prima facie case of strike participation and reasonableness of removal penalty).

Accordingly, having fully considered the appellants' petitions for review of the presiding official's remand initial decision issued on December 17, 1984, and finding that they fail to meet the criteria under 5 C.F.R. § 1201.115, the Board hereby DENIES the petitions.

This is the final order of the Merit Systems Protection Board in these appeals.¹⁰ 5 C.F.R. § 1201.113. The remand initial decision shall become final five (5) days from the date of this order.

Each appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review, if the court has jurisdiction, of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The

¹⁰ Appellants affected by this decision are listed in the attached Appendix A.

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petition for judicial review must be received by the court no later than thirty (30) days after receipt of this order.

FOR THE BOARD:

Joseph J. Ellis for
Robert E. Taylor, *Clerk of the
Board*

Washington, D.C.

United States Court of Appeals for the Federal Circuit

TERRY L. ANDERSON, et al.,
LEIGH ANDERSON, et al.,
ALLAN A. BROHOLM, et al.,
and RUDOLF C. RADNOFF,

Petitioners,

v.

DEPARTMENT OF
TRANSPORTATION,
FEDERAL AVIATION
ADMINISTRATION,

Respondent.

Appeal Nos.
85-1146,
85-1824
85-2814 and
85-2821

JUDGEMENT

ON APPEAL from the Merit Systems Protection Board
IN CASE NO(S). CH075281F0887; CH075281F0876;
CH075281F1088; CH075281F2688

This CAUSE having been heard and considered, it is
ORDERED and ADJUDGED: AFFIRMED, J. Baldwin
dissenting.

Entered By Order Of The Court

DATED: Sept. 3, 1987 FRANCIS X. GINDHART, CLERK

ISSUED AS A MANDATE: December 8, 1987
COSTS: Against, Petitioners Leigh Anderson, et al.
PRINTING\$196.48
TOTAL\$196.48

NOTE: This Order has not been prepared for publication in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent.

United States Court of Appeals for the Federal Circuit
CORRECTED COPY

TERRY L. ANDERSON, et al,
LEIGH ANDERSON, et al,
ALLAN A. BROHOLM, et al,
and RUDOLF C. RADNOFF,

Petitioners,

v.

DEPARTMENT OF
TRANSPORTATION,
FEDERAL AVIATION
ADMINISTRATION,

Respondent.

Appeal Nos.
85-1146,
85-1824
85-2814 and
85-2821

Before BALDWIN, Senior Circuit Judge,* NIES AND
ARCHER, Circuit Judges.

ORDER

A petition for rehearing having been filed in this case, UPON CONSIDERATION THEREOF, it is ORDERED that the petition for rehearing be, and the same hereby is denied.

Judge Baldwin would grant the petition.

The suggestion for rehearing in banc is under consideration.

FOR THE COURT

Date: October 19, 1987

Francis X. Gindhart, Clerk

cc: Mr. Gary Ethan Klein

Mr. Stephen J. McHale, DOJ

* The Honorable Phillip B. Baldwin assumed Senior Circuit Judge status effective November 25, 1986.

